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# federal register

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Wednesday  
June 24, 1992

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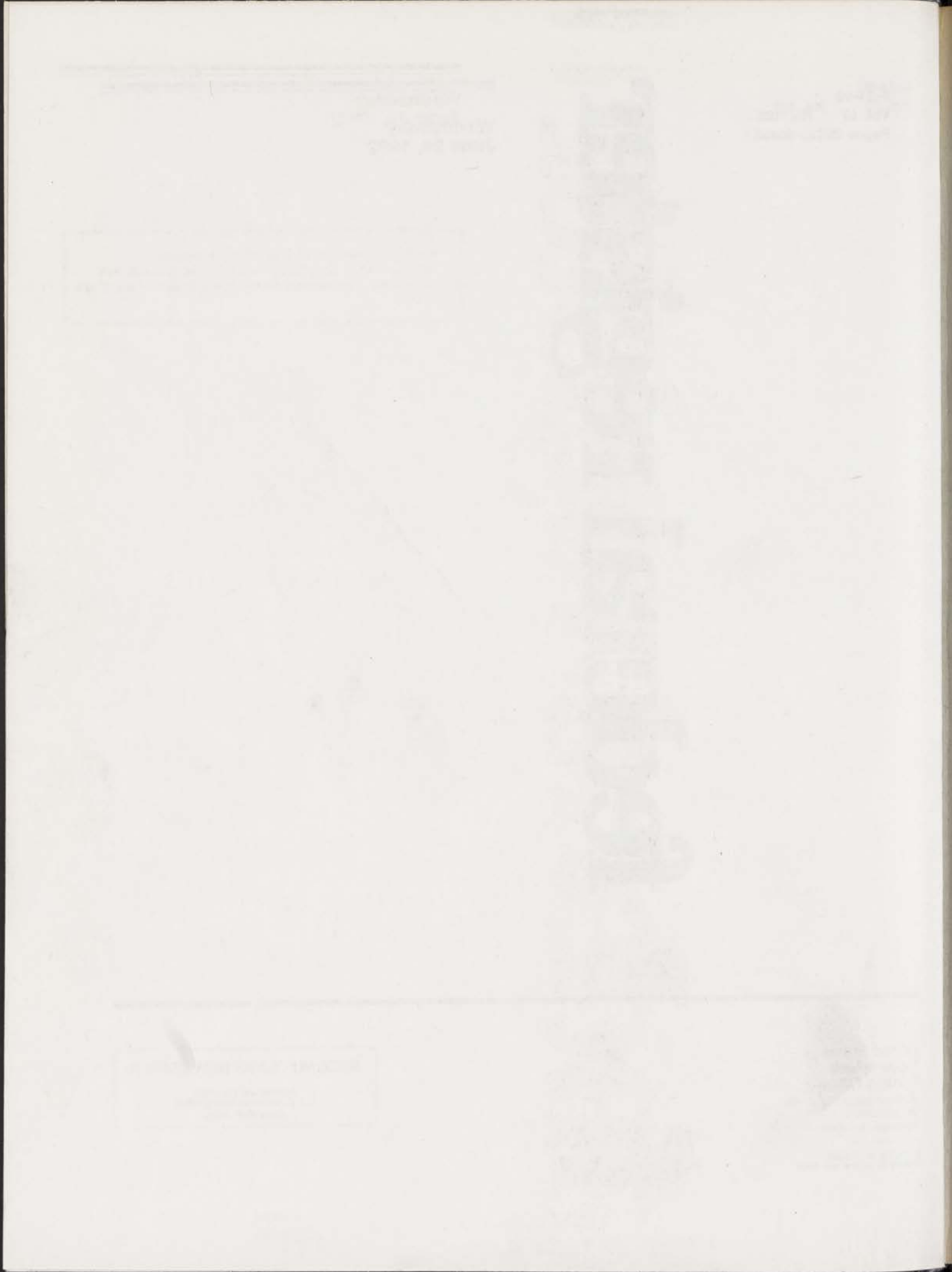
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# Federal Register

**Briefing on How To Use the Federal Register**  
For information on briefings in San Francisco, CA and  
Seattle, WA, see announcement on the inside cover of this  
issue.





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## THE FEDERAL REGISTER

### WHAT IT IS AND HOW TO USE IT

- FOR:** Any person who uses the Federal Register and Code of Federal Regulations.
- WHO:** The Office of the Federal Register.
- WHAT:** Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

### SAN FRANCISCO, CA

- WHEN:** July 22, at 9:00 am
- WHERE:** Federal Building and U.S. Courthouse, Conference Room 7209-A, 450 Golden Gate Avenue, San Francisco, CA
- RESERVATIONS:** Federal Information Center, 1-800-726-4995

### SEATTLE, WA

- WHEN:** July 23, at 1:00 pm
- WHERE:** Henry M. Jackson Federal Building, North Auditorium, 915 Second Avenue, Seattle, WA
- RESERVATIONS:** Federal Information Center, 1-800-726-4995



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# Presidential Documents

Title 3—

Proclamation 6449 of June 22, 1992

The President

## Agreement on Trade Relations Between the United States of America and the Republic of Romania

By the President of the United States of America

### A Proclamation

1. Pursuant to the authority vested in me by the Constitution and the laws of the United States, as President of the United States of America, I, acting through duly empowered representatives, entered into negotiations with representatives of Romania to conclude an agreement on trade relations between the United States of America and Romania.
2. These negotiations were conducted in accordance with the requirements of the Trade Act of 1974 (Public Law 93-618, January 3, 1975; 88 Stat. 1978), as amended (the "Trade Act").
3. As a result of these negotiations, an "Agreement on Trade Relations Between the Government of the United States of America and the Government of Romania," including exchanges of letters which form an integral part of the Agreement, the foregoing in English and Romanian, was signed on April 3, 1992, by duly empowered representatives of the two Governments and is set forth as an annex to this proclamation.
4. This Agreement conforms to the requirements relating to bilateral commercial agreements set forth in section 405(b) of the Trade Act (19 U.S.C. 2435(b)).
5. Article XVI of the Agreement provides that the Agreement shall enter into force on the date of exchange of written notices of acceptance by the two Governments.
6. Section 405(c) of the Trade Act (19 U.S.C. 2435(c)) provides that a bilateral commercial agreement providing nondiscriminatory treatment to the products of a country heretofore denied such treatment, and a proclamation implementing such agreement, shall take effect only if approved by the Congress under the provisions of that Act.
7. Section 604 of the Trade Act (19 U.S.C. 2483) authorizes the President to embody in the Harmonized Tariff Schedule of the United States the substance of the provisions of that Act, of other acts affecting import treatment, and actions taken thereunder.

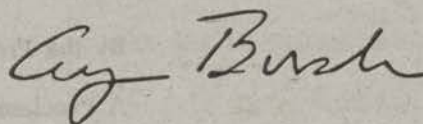
NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including but not limited to sections 404, 405, and 604 of the Trade Act of 1974, as amended, do proclaim that:

(1) This proclamation shall become effective, said Agreement shall enter into force, and nondiscriminatory treatment shall be extended to the products of Romania, in accordance with the terms of said Agreement, on the date of exchange of written notices of acceptance in accordance with Article XVI of said Agreement. The United States Trade Representative shall publish notice of the effective date in the **Federal Register**.



(2) Effective with respect to articles entered, or withdrawn from warehouse for consumption, into the customs territory of the United States on or after the date provided in paragraph (1) of this proclamation, general note 3(b) of the Harmonized Tariff Schedule of the United States, enumerating those countries whose products are subject to duty at the rates set forth in rate of duty column 2 of the tariff schedule, is modified by striking out "Romania".

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of June, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and sixteenth.



Billing code 3195-01-M



AGREEMENT ON TRADE RELATIONS BETWEEN  
THE GOVERNMENT OF THE UNITED STATES OF AMERICA  
AND THE GOVERNMENT OF ROMANIA

The Government of the United States of America and the Government of Romania (hereinafter referred to collectively as "Parties"-and individually as "Party"),

Affirming that the evolution of market-based economic institutions and the strengthening of the private sector will aid the development of mutually beneficial trade relations,

Acknowledging that the development of trade relations and direct contact between nationals and companies of the United States and nationals and companies of Romania will promote openness and mutual understanding,

Considering that expanded trade relations between the Parties will contribute to the general well-being of the peoples of each Party,

Recognizing that development of bilateral trade may contribute to better mutual understanding and cooperation and promote respect for internationally recognized worker rights,

Having agreed that economic ties are an important and necessary element in the strengthening of their bilateral relations,

Being convinced that an agreement on trade relations between the two Parties will best serve their mutual interests, and

Desiring to create a framework which will foster the development and expansion of commercial ties between their respective nationals and companies,

Have agreed as follows:



## ARTICLE I

## APPLICATION OF GATT AND CERTAIN GATT AGREEMENTS

1. Both Parties reaffirm the importance of their rights and obligations under the General Agreement on Tariffs and Trade ("GATT") and reaffirm the importance of the provisions and principles of the GATT to their respective economic policies.

2. To this end, the Parties shall apply between themselves the provisions of the GATT as those provisions apply to each Party, and shall accord each other's products most-favored-nation treatment ("MFN") as provided in the GATT, provided that to the extent any provision of the GATT is inconsistent with this Agreement, the latter shall apply.

3. Both Parties reaffirm the importance of their participation in the GATT Code Agreements to which both are signatories, which presently include the Agreement on Technical Barriers to Trade ("Standards Code"), the Agreement on Implementation of Article VI ("Anti-Dumping Code"), the Agreement on Implementation of Article VII ("Customs Valuation Code"), the Agreement on Import Licensing Procedures ("Licensing Code"), the Agreement on Trade in Civil Aircraft ("Aircraft Code"), and the Arrangement Regarding Bovine Meat, and the importance of the provisions and principles contained therein to their respective economic policies.

4. Both Parties commit to participate constructively in multilateral negotiations aimed at improving existing agreements



and any other multilateral negotiations under the auspices of the GATT.

5. Each Party shall accord to imports of products and services originating in the territory of the other Party most-favored-nation treatment with respect to the allocation of and access to currency to pay for such imports.

## ARTICLE II

### GENERAL OBLIGATIONS WITH RESPECT TO TRADE

1. The Parties agree to maintain a satisfactory balance of market access opportunities through concessions in trade in products and services, including the satisfactory reciprocation of reductions in tariffs and nontariff barriers to trade resulting from multilateral negotiations.

2. With a view to assuring nondiscriminatory trade in products and services, such trade shall be effected by contracts between nationals and companies of either Party concluded in the exercise of their independent commercial judgment and on the basis of customary commercial considerations such as price, quality, availability, delivery, and terms of payment.

3. Neither Party shall require or encourage its nationals or companies to engage in barter or countertrade transactions with nationals or companies of the other Party. Nevertheless, where nationals or companies decide to resort to barter or countertrade operations, the Parties will encourage them to



furnish to each other all necessary information to facilitate the transaction.

### ARTICLE III

#### EXPANSION AND PROMOTION OF TRADE

1. The Parties affirm their desire to expand trade in products and services consistent with the terms of this Agreement. They shall take appropriate measures to encourage and facilitate the exchange of goods and services and to secure favorable conditions for long-term development of trade relations between their respective nationals and companies.

2. The Parties shall take appropriate measures to encourage the expansion of commercial contacts with a view to increasing trade. In this regard, the Government of Romania expects that, during the term of this Agreement, nationals and companies of Romania shall increase their orders in the United States for products and services, while the Government of the United States anticipates that the effect of this Agreement shall be to encourage increased purchases by nationals and companies of the United States of products and services from Romania. Toward this end, the Parties shall publicize this Agreement and ensure that it is made available to all interested parties.

3. Each Party shall encourage and facilitate the holding of trade promotional events such as fairs, exhibitions, missions and seminars in its territory and in the territory of the other Party. Similarly, each Party shall encourage and facilitate the



participation of its respective nationals and companies in such events. Each Party shall permit participation in such events by commercial representations on nondiscriminatory terms and conditions. Subject to the laws in force within their respective territories, the Parties agree to allow the import and re-export on a duty free basis of all articles for use in such events, provided that such articles are not sold or otherwise transferred.

#### ARTICLE IV

##### GOVERNMENT COMMERCIAL OFFICES

1. In order to promote the development of trade and economic relations between the Parties, and to provide assistance to their nationals and companies engaged in commercial activities, each Party agrees to permit and facilitate the establishment and operation of Government commercial offices of the other Party on a reciprocal basis. The establishment and operation of such offices shall be in accordance with applicable laws and regulations, and subject to such terms, conditions, privileges, and immunities as may be agreed upon by the Parties.

2. Government commercial offices and their respective officers and staff members, to the extent that they enjoy diplomatic immunity, shall not participate directly in the negotiation, execution, or fulfillment of trade transactions, or otherwise carry on trade.



3. Subject to its laws governing foreign missions, each Party shall allow government commercial offices to hire directly host-country nationals and, subject to immigration laws and procedures, third-country nationals.

4. Each Party shall ensure unhindered access of host-country nationals to government commercial offices of the other Party.

5. Each Party shall encourage the participation of its nationals and companies in the activities of their respective government commercial offices, especially with respect to events held on the premises of such commercial offices.

6. Each Party shall encourage and facilitate access of government commercial office personnel of the other Party to host-country officials, and to representatives of host-country nationals and companies.

7. This Agreement shall not derogate from obligations assumed by either Party concerning the establishment of existing government commercial offices.

#### ARTICLE V

##### BUSINESS FACILITATION

1. Each Party shall afford commercial representations of the other Party fair and equitable treatment with respect to the conduct of their operations.



2. Each Party shall endeavor to ensure that governmental decisions, rulings, and findings affecting the conduct of commercial activities are made expeditiously.

3. Subject to its laws and procedures governing immigration and foreign missions, each Party shall permit the establishment within its territory of commercial representations of nationals and companies of the other Party and shall accord such representations treatment at least as favorable as that accorded to commercial representations of nationals and companies of third countries.

4. Parties shall permit employees of commercial representations and members of their immediate families to enter the territory of the other Party and to travel therein freely, in accordance with the laws relating to the entry, stay and travel of aliens. Each Party agrees to make available multiple entry visas of duration of six months or longer to such persons and to members of their immediate families.

5. Subject to its laws and procedures governing immigration and foreign missions, each Party shall permit such commercial representations established in its territory to hire directly employees who are nationals of either Party or of third countries and to compensate such employees on terms and in a currency that is mutually agreed between the parties, consistent with such Party's minimum wage laws.



6. Each Party shall permit commercial representations of the other Party to import and use in accordance with normal commercial practices, office and other equipment, such as typewriters, photocopiers, computers and telefax machines, in connection with the conduct of their activities in the territory of such Party.

7. Each Party shall permit, on a nondiscriminatory basis and at nondiscriminatory prices (where such prices are set or controlled by the government), commercial representations of the other Party access to and use of office space and living accommodations, whether or not designated for use by foreigners. The terms and conditions of such access and use shall in no event be on a basis less favorable than that accorded to commercial representations of nationals and companies of third countries.

8. Subject to its laws and procedures governing immigration and foreign missions, each Party shall permit nationals and companies of the other Party to engage agents, consultants and distributors of either Party and of third countries on prices and terms mutually agreed between the parties.

9. Subject to its laws and procedures governing immigration and foreign missions, each Party shall permit nationals and companies of the other Party to serve as agents, consultants and distributors of nationals and companies of either Party and of third countries on prices and terms mutually agreed between the parties.



10. Each Party shall permit nationals and companies of the other Party to advertise their products and services (i) through direct agreement with the advertising media, including television, radio, print and billboard, and (ii) by direct mail, including the use of enclosed envelopes and cards preaddressed to that national or company.

11. Each Party shall encourage direct contact, and permit direct sales, between nationals and companies of the other Party and end-users and other customers of their goods and services, and with agencies whose decisions will affect potential sales.

12. Each Party shall permit nationals and companies of the other Party to conduct market studies, either directly or by contract, within its territory. To facilitate the conduct of market research, each Party shall upon request make available non-confidential, non-proprietary information within its possession to nationals and companies of the other Party.

13. Each Party shall provide nondiscriminatory access to government-provided products and services, including public utilities and telecommunications facilities, to nationals and companies of the other Party in connection with the operation of their commercial representations.

14. Each Party shall permit commercial representations to stock an adequate supply of samples and replacement parts for after-sale service on a non-commercial basis.



15. Neither Party shall impose measures which unreasonably impair contractual or property rights or other interests acquired within its territory by nationals and companies of the other Party.

16. Paragraphs 6 and 14 of this Article shall not be construed to affect the application of ordinary customs and tariff laws.

## ARTICLE VI

### TRANSPARENCY

1. Each Party shall make available publicly on a timely basis all laws, regulations, judicial decisions, and administrative rulings related to commercial activity, including trade, investment, taxation, banking, insurance and other financial services, transport and labor.

2. Each Party shall provide nationals and companies of the other Party with access to available non-confidential, non-proprietary data and information on the national economy and individual sectors, including information on foreign trade, production figures, and other such information related to each Party's internal market.

3. Each Party shall allow the other Party, and the other Party's nationals and companies, the opportunity to comment, to the extent practicable, on the formulation of laws, regulations, standards, and administrative rulings which affect the conduct of their business activities.



## ARTICLE VII

FINANCIAL PROVISIONS RELATING TO TRADE  
IN PRODUCTS AND SERVICES

1. Unless otherwise agreed between the parties to individual transactions, all commercial transactions between nationals and companies of the Parties shall be made in United States dollars or any other currency that may be designated by the International Monetary Fund as being a freely usable currency.

2. Neither Party shall restrict the transfer from its territory of convertible currencies or deposits, or payment instruments representative thereof, obtained in connection with trade in products and services by nationals and companies of the other Party.

3. Nationals and companies of a Party holding currency of the other Party received in an authorized manner may deposit such currency in financial institutions located in the territory of the other Party and may maintain and use such currency for local expenses.

4. Without derogation from paragraphs 2 or 3 of this Article, in connection with trade in products and services, each Party shall grant to nationals and companies of the other Party the better of most-favored-nation or national treatment with respect to:

- (a) opening and maintaining accounts, in both local and foreign currency, and having access to their funds



deposited, in financial institutions located in the territory of the Party;

(b) payments, remittances and transfers of convertible currencies, or financial instruments representative thereof, between the territories of the two Parties, as well as between the territory of that Party and that of any third country;

(c) rates of exchange and related matters, including access to freely usable currencies, such as through currency auctions; and

(d) the receipt and use of local currency.

#### ARTICLE VIII

##### PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

1. Each Party shall provide adequate and effective protection and enforcement for patents, trademarks, copyrights, trade secrets, and integrated circuit layout designs as set forth in the text of the attached side letter on intellectual property.

#### ARTICLE IX

##### AREAS FOR FURTHER COOPERATION

1. For the purpose of further developing bilateral trade and promoting a steady increase in the exchange of products and services, both Parties shall strive to achieve a mutually acceptable agreement on investment issues, including the repatriation of profits and transfer of capital.



2. The Parties shall take appropriate steps to foster economic and technical cooperation on as broad a base as possible in all fields deemed to be in their mutual interest, including cooperation with respect to statistics and standards, as well as production figures.

3. The Parties, taking into account the increasing economic significance of service industries, agree to consult on matters affecting service businesses in the two countries and particular matters of mutual interest relating to individual service sectors with the objective, among others, of attaining maximum possible market access and liberalization.

#### ARTICLE X

##### IMPORT RELIEF SAFEGUARDS

1. The Parties agree to consult promptly at the request of either Party whenever actual or prospective imports of products originating in the territory of the other Party cause, threaten to cause, or significantly contribute to market disruption. Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by a domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to the domestic industry.



2. The consultations provided for in paragraph 1 of this Article shall have the objectives of (i) presenting and examining the factors relating to such imports that may be causing or threatening to cause or significantly contributing to market disruption, and (ii) finding means of preventing or remedying such market disruptions. Such consultations shall be concluded within sixty days from the date of the request for such consultation, unless the Parties otherwise agree.

3. Unless a different solution is mutually agreed upon during the consultations, the importing Party may (i) impose quantitative import limitations, tariff measures or any other restrictions or measures to such extent and for such time as it deems appropriate to prevent or remedy threatened or actual market disruption, and (ii) take appropriate measures to ensure that imports from the territory of the other Party comply with such quantitative limitations or other restrictions. In this event, the other Party shall be free to deviate from its obligations under this Agreement with respect to substantially equivalent trade.

4. Where in the judgment of the importing Party, emergency action is necessary to prevent or remedy such market disruption, the importing Party may take such action at any time and without prior consultations provided that consultations shall be requested immediately thereafter.



5. Each Party shall ensure that its domestic procedures for determining market disruption are transparent and afford affected parties an opportunity to submit their views.

6. In the selection of measures under this Article, the Parties shall give priority to those measures which cause the least disturbance to the goals and provisions of this Agreement.

7. The Parties acknowledge that the elaboration of the market disruption safeguard provisions in this Article is without prejudice to the right of either Party to apply its own unfair trade laws and regulations, including antidumping and countervailing duty laws and those laws applicable to trade in textiles and textile products.

## ARTICLE XI

### DISPUTE SETTLEMENT

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to all courts and administrative bodies in the territory of the other Party, as plaintiffs, defendants or otherwise. They shall not claim or enjoy immunity from suit or execution of judgment, proceedings for the recognition and enforcement of arbitral awards, or other liability in the territory of the other Party with respect to commercial transactions; they also shall not claim or enjoy immunities from taxation with respect to commercial transactions, except as may be provided in other bilateral agreements.



2. The Parties encourage the adoption of arbitration for the settlement of disputes arising out of commercial transactions concluded between nationals or companies of the United States and nationals or companies of Romania. Such arbitration may be provided for by agreements in contracts between such nationals and companies, or in separate written agreements between them.

3. The parties may provide for arbitration under any internationally recognized arbitration rules, such as the arbitration rules of the International Chamber of Commerce or the UNCITRAL Rules. If the parties elect the UNCITRAL Rules, the parties should designate an Appointing Authority under said rules in a country other than the United States or Romania.

4. Unless otherwise agreed between the parties, the parties should specify as the place of arbitration a country other than the United States or Romania that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 1958.

5. Nothing in this Article shall be construed to prevent, and the Parties shall not prohibit, the parties from agreeing upon any other form of arbitration or dispute settlement which suits their particular needs.

6. Each Party shall ensure that an effective means exists within its territory for the recognition and enforcement of arbitral awards.



## ARTICLE XII

### NATIONAL SECURITY

1. The provisions of this Agreement shall not limit the right of either Party to take any action for the protection of its security interests.

## ARTICLE XIII

### CONSULTATIONS

1. The Joint American-Romanian Economic Commission, established on December 5, 1973, shall periodically review the operation of this Agreement and make recommendations for achieving its objectives. The Commission shall operate pursuant to its existing Terms of Reference and Rules of Procedure, as the same may be modified from time to time by the Parties.

2. At the request of either Party, the Parties agree to consult promptly through appropriate channels to discuss any matter concerning the interpretation or implementation of this Agreement or other relevant aspects of relations between the Parties.

## ARTICLE XIV

### DEFINITIONS

1. As used in this Agreement, the terms set forth below shall have the following meaning:

(a) "company" means any kind of corporation, company, association, sole proprietorship, or other



organization legally constituted under the laws and regulations of a Party or a political subdivision thereof, whether or not organized for pecuniary gain, and whether or not privately or government owned.

(b) "commercial representation" means a representation of a company of a Party.

(c) "national" means a natural person who is a national of a Party under the Party's applicable laws.

#### ARTICLE XV

##### GENERAL EXCEPTIONS

1. Nothing in this Agreement shall be construed to prohibit any action by either Party which is required or permitted by the GATT.

2. So long as the measure does not constitute either an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prohibit:

(a) measures for the protection of intellectual property rights and for the prevention of deceptive practices, as set out in Article VIII and the side letters to this Agreement, provided that such measures shall be related



to the extent of an injury suffered or to prevent such an injury's occurrence;

(b) measures for reasons contemplated by Article XX of the GATT, provided that the term "Agreement" in GATT Article XX, paragraph (d) shall be construed to refer to this Agreement.

3. Trade in products or services between the Parties which is subject to existing or subsequent bilateral or multilateral agreements on specific sectoral trade, such as existing agreements on textiles and civil aircraft, shall be subject to the terms of any such agreement.

4. Each Party reserves the right to deny the advantages of this Agreement to any company if either (i) nationals of a third country control the company and the company has no substantial business activities in the territory of the other Party, or (ii) the company is controlled by nationals of a third country with which the Party does not maintain normal economic relations.

#### ARTICLE XVI

##### ENTRY INTO FORCE, TERM, SUSPENSION AND TERMINATION

1. This Agreement (including its side letters, which are an integral part of the Agreement) shall enter into force upon an exchange of diplomatic notes in which the Parties notify each other that all necessary legal requirements for entry into force have been fulfilled, and shall remain in force as provided in paragraphs 3 and 4 of this Article.



2. This Agreement shall, upon entry into force, supercede in all respects the Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania, done on April 2, 1975, and the Agreement Suspending Mutual Application of Most Favored Nation Tariff Treatment Under the Trade Agreement of April 2, 1975, done on June 22, 1988, which agreements shall have no further force or effect.

3. (a) The initial term of this Agreement shall be three years, subject to subparagraph (b) and (c) of this paragraph.

(b) If either Party encounters or foresees a problem concerning its domestic legal authority to carry out any of its obligations under this Agreement, such Party shall request immediate consultations with the other Party. Once consultations have been requested, the other Party shall enter into such consultations as soon as possible concerning the circumstances that have arisen with a view to finding a solution to avoid action under subparagraph (c).

(c) If either Party does not have domestic legal authority to carry out its obligations under this Agreement, either Party may suspend the application of this Agreement or, with the agreement of the other Party, any part of this Agreement. In that event, the Parties will, to the fullest extent practicable and consistent with domestic law, seek to minimize disruption to existing trade relations between the two countries.

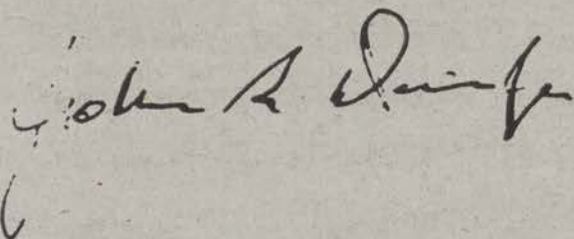


4. This Agreement shall be extended for successive terms of three years each unless either Party has given written notice to the other Party of its intent to terminate this Agreement at least 30 days prior to the expiration of the then current term.

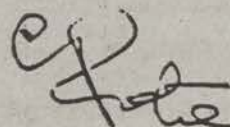
IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at BUCHAREST on this 3<sup>RD</sup> day of April 1992, in duplicate, in the English and the Romanian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE  
UNITED STATES OF AMERICA:



FOR THE GOVERNMENT OF  
ROMANIA:







Bucharest, April 3, 1992

Dear Mr. Minister,

I have the honor to confirm receipt of your letter that reads as follows:

Dear Mr. Ambassador:

In connection with the signing on this date of the Agreement on Trade Relations Between the Government of the United States of America and the Government of Romania (the "Agreement"), I have the honor to confirm the understanding reached by our Governments as follows:

In order to foster increased commercial activities and economic cooperation, the Government of Romania and the Government of the United States of America (the "Parties") agree to undertake the following activities:

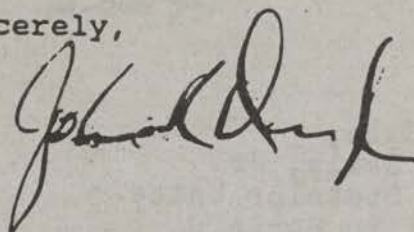
1. To encourage their respective nationals and companies to develop, publish, and provide directly, directories of nationals and companies involved in foreign trade and their officers, as well as other information useful in contacting and evaluating potential business partners, and lists of government agencies and officers involved in foreign trade policy and regulation; and

2. To create favorable conditions for access to nonproprietary and nonconfidential commercial information useful in evaluating potential business partners, such as their financial reports, profit and loss statements, and experiences in foreign trade.

I have the further honor to propose that this understanding be treated as an integral part of the Agreement. I would be grateful if you would confirm that this understanding is shared by your government.

I have the further honor to confirm that the foregoing understanding is shared by my Government and constitutes an integral part of the Agreement.

Sincerely,



The Honorable Constantin Fota  
Minister of Commerce and Tourism  
Romania



București, 3 aprilie 1992

Stimate domnule ambasador,

În legătură cu semnarea la această dată a Acordului privind relațiile comerciale între guvernul României și guvernul Statelor Unite ale Americii ("Acordul"), am onoarea să confirm înțelegerea la care s-a ajuns de către guvernele noastre, și anume:

În vederea promovării dezvoltării activităților comerciale și a cooperării economice, guvernul României și guvernul Statelor Unite ale Americii ("Părțile") convin să se angajeze în următoarele acțiuni :

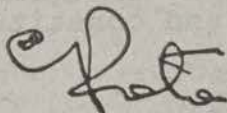
1. Incurajarea cetățenilor și companiilor din țările respective de a realiza, publica și furniza direct ghiduri cuprinzând numele cetățenilor și companiilor implicate în comerțul exterior și ale persoanelor din conducerea acestora ca și alte informații folositoare în stabilirea de contacte și evaluarea potențialilor parteneri de afaceri, precum și liste cu agențiile guvernamentale și persoanele de conducere implicate în politica și reglementarea comerțului exterior; și

2. Crearea unor condiții favorabile pentru accesul la informații comerciale neprotejate de vreun drept de proprietate și neconfidențiale, folositoare în vederea evaluării potențialilor parteneri de afaceri, cum ar fi rapoartele lor financiare, dări de seamă/extrase de cont privind beneficiile și pierderile și activități concrete în comerțul exterior.

În continuare, am onoarea de a propune ca această înțelegere să fie tratată ca parte integrantă a Acordului. Aș fi recunoscător dacă ați confirma că această înțelegere este împărtășită de către guvernul dumneavoastră.

Cu stimă,

Constantin Fota  
Ministrul comerțului și turismului al României



Excelenței Sale,  
Dl. John R. Davis, Jr.  
Ambasadorul Statelor Unite  
ale Americii în România



Bucharest, April 3, 1992

Dear Mr. Minister,

I have the honor to confirm receipt of your letter that reads as follows:

Dear Mr. Ambassador:

In connection with the signing on this date of the Agreement on Trade Relations Between the United States of America and Romania (the "Agreement"), I have the honor to confirm the understanding reached by our Governments (the "Parties") regarding cooperation in the field of tourism services as follows:

GOAL

1. Both Parties shall facilitate the expansion of tourism between the United States and Romania and encourage the adoption of measures by tourist companies of both countries to satisfy the desire of tourists to learn about the lifestyles, achievements, history and culture of each country.

OFFICIAL TOURISM PROMOTION

1. Each Party shall seek permission of the other Party prior to the establishment of official, governmental tourism promotion offices in the other's territory.

2. Permission to open tourism promotion offices or field offices and the status of personnel at those offices shall be subject to the agreement of the Parties and subject to the laws and regulations of the host country.

The Honorable Constantin Fota  
Minister of Commerce and Tourism  
Romania



3. Tourism promotion offices opened by either Party shall be operated on a non-commercial basis. Official tourism promotion offices and the personnel assigned to them shall not function as agents or principals in commercial transactions, enter into contractual agreements on behalf of commercial organizations, or engage in any other commercial activities. Such offices shall not sell services to the public or otherwise compete with travel agents or tour operators of either country.

4. Official governmental tourism offices shall conduct activities related to the promotion and facilitation of tourism between the United States and Romania, including:

(a) providing information about the tourist facilities and attractions in their respective countries to the public, the travel industry, and the media;

(b) holding meetings and workshops for representatives of the travel industry, as appropriate;

(c) participating in trade shows;

(d) distributing advertising and promotional materials such as posters, brochures, and photographs to the public, the travel industry, and the media;

(e) performing tourism market research.

5. Nothing in this letter shall obligate either Party to open an official governmental tourism office in the territory of the other.

#### COMMERCIAL TOURISM COMPANIES

1. Commercial tourism companies, whether privately or governmentally owned, or branches thereof, shall be treated as private commercial companies, fully subject to all applicable laws and regulations of the host country.

2. Each Party shall ensure within the scope of its legal authority and in accordance with its laws and regulations that any company owned, controlled, or administered by that Party or any joint venture therewith, or any private company or joint venture between private companies, which effectively controls a significant



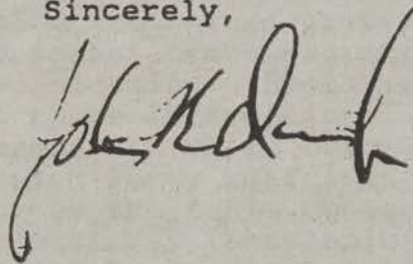
proportion of the tourism and travel-related services in the territory of that Party shall provide those services to nationals and companies of the other Party on a fair and equitable basis.

Nothing in this letter or in the Agreement shall be construed to mean that tourism and travel-related services shall not receive the benefits from the Agreement as fully as all other industries and sectors.

I have the further honor to propose that this understanding be treated as an integral part of the Agreement. I would be grateful if you would confirm that this understanding is shared by your government.

I have the further honor to confirm that the foregoing understanding is shared by my Government and constitutes an integral part of the Agreement.

Sincerely,

A handwritten signature in dark ink, appearing to read "John H. Duth", with a long, sweeping underline that extends to the left.

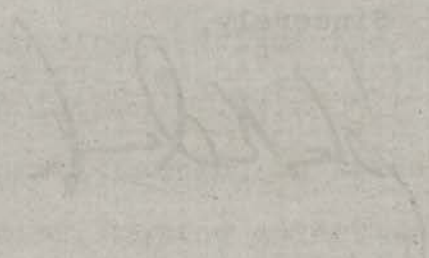


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Sincerely,  




Bucharest, April 3, 1992

Dear Mr. Minister,

I have the honor to confirm receipt of your letter that reads as follows:

Dear Mr. Ambassador:

In connection with the signing on this date of the Agreement on Trade Relations between the Government of the United States and the Government of Romania (the "Agreement"), I have the honor to confirm the understanding reached by our Governments as follows:

The Parties agree to provide adequate and effective protection and enforcement of intellectual property rights in patents, trademarks, copyrights, trade secrets, and layout designs for integrated circuits. Each Party reaffirms its commitments to those international agreements relating to intellectual property to which both Parties are signatories. Specifically, each Party reaffirms the commitments made with respect to the Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967) and the Berne Convention for the Protection of Literary and Artistic Works.

1. Each Party shall provide no less favorable treatment to the right holders of the other Party than it provides to its own right holders with respect to laws, regulations and practices implementing the provisions of this letter.

2. To provide adequate and effective protection and enforcement of intellectual property rights, each Party shall continue to adhere to the Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967) (Paris Convention), and shall adhere to the Berne Convention for the protection of Literary and Artistic Works (Paris 1971) (Berne Convention), and the Geneva Convention for the Protection of Producers of Phonograms (Geneva Convention) and shall also observe, inter alia, the following:

The Honorable Constantin Fota  
Minister of commerce and Tourism  
Romania



(a) COPYRIGHT AND RELATED RIGHTS

(i) Each Party shall protect the works listed in Article 2 of the Berne Convention and any other works now known or later developed, that embody original expression within the meaning of the Berne Convention, including:

- (1) all types of computer programs (including application programs and operating systems) expressed in any language, whether in source or object form which shall be protected as literary works; and,
- (2) collections or compilations of protected or unprotected material or data whether in print, machine readable or any other medium, including data bases, which shall be protected in so far as they constitute an intellectual creation by reason of the selection, coordination, or arrangement of their contents.

(ii) Each Party shall ensure that the rights provided to authors in works protected pursuant to paragraph 2(a)(i) of this letter shall include, the following:

- (1) the exclusive right to import or authorize the importation into the territory of the Party of lawfully made copies of the work;
- (2) the exclusive right to prevent the importation into the territory of the Party of copies of the work made without the authorization of the right-holder;
- (3) the exclusive right to make the first public distribution of the original or each authorized copy of a work by sale, rental, or otherwise;
- (4) in respect of at least computer programs, the exclusive right to authorize or prohibit the rental of the original or copies of their copyrighted works. Each Party may exclude from the rental right programs that are fixed as part of a machine or are fixed in a medium that is not susceptible to



copying. Putting the originals or copies of computer programs on the market with the consent of the right-holder shall not exhaust the rental right; and

(5) the exclusive right to publicly communicate a work except for a sound recording (e.g., to perform, display, project, exhibit, broadcast, transmit, or retransmit a work); the term "public" shall include:

(A) communicating a work in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(B) communicating or transmitting a work, a performance, or a display of a work, in any form, or by means of any device or process to a place specified in clause 2(ii)(5)(A) or to the public, regardless of whether the members of the public capable of receiving such communications can receive them in the same place or separate places and at the same time or at different times.

(iii) Parties shall extend the protection afforded under paragraph 2(a)(i) and 2(a)(ii) of this letter to authors of the other Party, whether they are natural persons or, where the domestic law of the Party seeking protection so provides, juridical entities, and to their successors in title.

(iv) Each Party shall provide that the exclusive rights protected under paragraph 2(a)(ii) of this letter are freely and separately exploitable and transferable. Each Party also shall provide that assignees and exclusive licensees may enjoy all rights of their assignors and licensors acquired through voluntary agreements, and ensure that they are entitled to enjoy and exercise their acquired exclusive rights in their own names.



(v) In cases where a Party calculates the term of protection of a work on a basis other than the life of a natural person, the term of protection shall be no less than 50 years from the first authorized publication or, failing such authorized publication within 50 years from the making of the work, 50 years after the making.

(vi) Each Party shall confine any limitations upon and exceptions to the exclusive rights provided under paragraph 2(a)(ii) of this letter (including any limitations or exceptions that restrict such rights to "public" activity) to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

(vii) Each Party shall limit resort to compulsory licensing to those works, rights and utilizations permitted under the Berne Convention; and further shall ensure that any legitimate compulsory or non-voluntary license or restriction of exclusive rights to a right of remuneration shall provide means to ensure payment and remittance of royalties at a level consistent with what would be negotiated on a voluntary basis.

(viii) Each Party shall, at a minimum, extend to producers of sound recordings the exclusive rights to do or to authorize the following:

- (1) to reproduce the recording by any means or process, in whole or in part; and
- (2) to exercise the importation and exclusive distribution and rental provided in paragraphs 2(a)(ii)(1)(2)(3) and (4) of this letter.

(ix) Paragraphs 2(a)(iii), (iv) and (vi) of this letter shall apply mutatis mutandis to sound recordings.

(x) Each Party shall:



- (1) protect sound recordings first fixed or published in the territory of the other Party;
- (2) protect sound recordings for a term of at least 50 years from publication; and
- (3) grant the right to make the first public distribution of the original of each authorized sound recording by sale, rental, or otherwise except that the first sale of the original of such sound recording shall not exhaust the rental or importation right therein (the "rental right" shall mean the right to authorize or prohibit the disposal of the possession of the original or copies for direct or indirect commercial advantage).

(xi) Parties shall not subject the acquisition and validity of intellectual property rights in sound recordings to any formalities, and protection shall arise automatically upon creation of the sound recording.

(b) TRADEMARKS

(i) Protectable Subject Matter

- (1) Trademarks shall consist of at least any sign, words, including personal names, designs, letters, numerals, colors, or the shape of goods or of their packaging, provided that the mark is capable of distinguishing the goods or services of one undertaking from those of other undertakings.
- (2) The term "trademark" shall include service marks, collective and may include certification marks.

(ii) Acquisition of Rights

- (1) Each Party shall provide a system for the registration of trademarks.



Parties shall provide protection for trademarks based on registration and may provide protection on the basis of use.

- (2) Each Party shall publish each trademark either before it is registered or promptly after it is registered and shall afford other parties a reasonable opportunity to petition to cancel the registration. In addition, each Party may afford an opportunity for the other Party to oppose the registration of a trademark.
- (3) The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

(iii) Rights Conferred

- (1) The owner of a registered trademark shall have exclusive rights therein. He shall be entitled to prevent all third parties not having his consent from using in commerce identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is protected, where such use would result in a likelihood of confusion.
- (2) Each Party shall refuse to register or shall cancel the registration and prohibit use of a trademark likely to cause confusion with a trademark of another which is considered to be well-known. A Party may not require that the reputation of the trademark extend beyond the sector of the public which normally deals with the relevant goods or services.
- (3) The owner of a trademark shall be entitled to take action against any



unauthorized use which constitutes an act of unfair competition.

- (4) The rights described in the foregoing paragraphs shall not prejudice any existing prior rights, nor shall this affect the possibility of Parties making rights available on the basis of use.

(iv) Term of Protection

Initial registration of a trademark shall be for a term of at least 10 years. The registration of a trademark shall be indefinitely renewable for terms of no less than 10 years when conditions for renewal have been met.

(v) Other Requirements

The use of a trademark in commerce shall not be encumbered by special requirements, such as use which reduces the function of a trademark as an indication of source or use with another trademark.

(vi) Compulsory Licensing

Compulsory licensing of trademarks shall not be permitted.

(vii) Transfer

Trademark registrations may be transferred.

(c) PATENTS

(i) Patentable Subject Matter

Patents shall be available for all inventions, whether products or processes, in all fields of technology, except that a Party may exclude from patentability any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon.

(ii) Rights Conferred



- (1) A patent shall confer the right to prevent others not having the patent owner's consent from making, using, or selling the subject matter of the patent. In the case of a patented process, the patent confers the right to prevent others not having consent from using that process and from using, selling, or importing at least the product obtained directly by that process.
- (2) Where the subject matter of a patent is a process for obtaining a product, each Party shall provide that the burden of establishing that an alleged infringing product was not made by the process shall be on the alleged infringer if the patent owner presents evidence that a substantial likelihood exists that the product was made by the process and the patent owner has been unable through reasonable efforts to determine the process actually used. In the gathering and evaluation of evidence to the contrary, the legitimate interests of the defendant in protecting his trade secrets shall be taken into account.
- (3) A patent may be revoked only on grounds that would have justified a refusal to grant the patent.

(iii) Exceptions

Each Party may provide limited exceptions to the exclusive rights conferred by a patent, such as for acts done for experimental purposes, provided that the exceptions do not significantly prejudice the economic interests of the right-holder, taking account of the legitimate interests of third parties.

(iv) Term of Protection

Each Party shall provide a term of protection of at least 20 years from the date of filing of the patent application or 17 years from the date of grant of the patent. Each Party



is encouraged to extend the term of patent protection, in appropriate cases, to compensate for delays caused by regulatory approval processes.

(v) Transitional Protection

A Party shall provide transitional protection for products embodying subject matter deemed to be unpatentable under its patent law prior to its implementation of the provisions of this letter, where the following conditions are satisfied:

- (1) the subject matter to which the product relates will become patentable after implementation of the provisions of this letter; and
- (2) a patent has been issued for the product by the other Party prior to the entry into force of the Agreement; and
- (3) the product has not been marketed in the territory of the Party providing such transitional protection.

The owner of a patent for a product satisfying the conditions set forth above shall have the right to submit a copy of the patent to the competent authority of the Party providing transitional protection. Such Party shall limit the right to make, use, or sell the product in its territory to such owner for a term to expire with that of the patent submitted.

(vi) Compulsory Licenses

Each Party may limit the patent owner's exclusive rights through compulsory licenses but only (1) to remedy an adjudicated violation of competition laws, (2) to address, only during its existence, a declared national emergency, and (3) to enable compliance with national air pollutant standards, where compulsory licenses are essential to such compliance.

Where the law of a Party allows for the grant of compulsory licenses, the following provisions shall be respected:



- (1) Compulsory licenses shall be non-exclusive and non-assignable except with that part of the enterprise which exploits such license.
- (2) The payment of remuneration to the patent owner adequate to compensate the patent owner fully for the license shall be required, except for compulsory licenses to remedy adjudicated violations of competition law.
- (3) Each case involving the possible grant of a compulsory license shall be considered on its individual merits except that such consideration may be waived in cases of a declared national emergency.
- (4) Any compulsory license shall be revoked when the circumstances which led to its granting cease to exist, taking into account the legitimate interests of the patent owner and of the licensee. The continued existence of these circumstances shall be reviewed upon request of the patent owner.
- (5) Judicial review shall be available for:
  - (a) Decisions to grant compulsory licenses, except in the instance of a declared national emergency,
  - (b) decisions to continue compulsory licenses, and
  - (c) decisions concerning the amount of compensation provided for compulsory licenses.

(d) LAYOUT-DESIGNS OF SEMICONDUCTOR INTEGRATED CIRCUITS

(i) Subject Matter for Protection

- (1) Each Party shall provide protection for original layout-designs incorporated in a semiconductor integrated circuit, however the layout-design might be fixed or encoded.



- (2) Each Party may condition protection on fixation or registration of the layout-designs. If registration is required, applicants shall be given at least two years from first commercial exploitation of the layout-design in which to apply. A Party which requires deposits of identifying material or other material related to the layout-design shall not require applicants to disclose confidential or proprietary information unless it is essential to allow identification of the layout-design.

(ii) Rights Acquired

- (1) Each Party shall provide to right-holders of lay-out designs of the other Party the exclusive right to do or to authorize the following:
  - (A) to reproduce the layout-design;
  - (B) to incorporate the layout-design in a semiconductor chip; and
  - (C) to import or distribute a semiconductor integrated circuit incorporating the layout-design and products including such integrated circuits.
- (2) The conditions set out in paragraph (c)(vi) of this paragraph shall apply, mutatis mutandis, to the grant of any compulsory licenses for layout-designs.
- (3) Neither Party is required to extend protection to layout-designs that are commonplace in the industry at the time of their creation or to layout-designs that are exclusively dictated by the functions of the circuit to which they apply.
- (4) Each Party may exempt the following from liability under its law:
  - (A) reproduction of a layout-design for purposes of teaching, analysis, or evaluation in the course of



preparation of a layout-design that is itself original;

- (B) importation and distribution of semiconductor chips, incorporating a protected layout-design, which were sold by or with the consent of the owner of the layout-design; and
- (C) importation or distribution up to the point of notice of a semiconductor chip incorporating a protected layout-design and products incorporating such chips by a person who establishes that he did not know, and had no reasonable grounds to believe, that the layout-design was protected, provided that, with respect to stock on hand or purchased at the time notice is received, such person may import or distribute only such stock but is liable for a reasonable royalty on the sale of each item after notice is received.

(iii) Term of Protection

The term of protection for the lay-out design shall extend for at least ten years from the date of first commercial exploitation or the date of registration of the design, if required, whichever is earlier.

(e) ACTS CONTRARY TO HONEST COMMERCIAL PRACTICES AND THE PROTECTION OF TRADE SECRETS

- (i) In the course of ensuring effective protection against unfair competition as provided for in Article 10 bis of the Paris Convention for the Protection of Industrial Property, each Party shall provide in its domestic law and practice the legal means for nationals and companies to prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the trade secret owner in a manner contrary to honest commercial practices insofar as such information:



- (1) is not, as a body or in the precise configuration and assembly of its components, generally known or readily ascertainable;
  - (2) has actual or potential commercial value because it is not generally known or readily ascertainable; and
  - (3) has been subject to reasonable steps under the circumstances to keep it secret.
- (ii) Neither Party shall limit the duration of protection for trade secrets so long as the conditions in paragraph 2(e)(i) of this letter exist.

(iii) Licensing

Neither Party shall discourage or impede voluntary licensing of trade secrets by imposing excessive or discriminatory conditions on such licenses or conditions which dilute the value of trade secrets.

(iv) Government Use

- (1) If a Party requires, as a condition of approving the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, that Party shall protect such data against unfair commercial use. Further, each Party shall protect such data against disclosure except where necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.
- (2) Unless the person submitting the information agrees, the data may not be relied upon for the approval of competing products for a reasonable period of time, taking into account the efforts involved in the origination of the data, their nature, and the expenditure involved in their



preparation, and such period of time shall generally be not less than five years from the date of marketing approval.

- (3) Where a Party relies upon a marketing approval granted by another Party, the reasonable period of exclusive use of the data submitted in connection with obtaining the approval relied upon shall commence with the date of the first marketing approval relied upon.

(f) ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

(i) Each Party shall protect intellectual property rights covered by this letter by means of civil law, criminal law, or administrative law or a combination thereof in conformity with the provisions below. Each Party shall provide effective procedures, and remedies to prevent or stop, within its territory and at the border, against any act of infringement, and effective remedies to stop and prevent infringements and to effectively deter further infringements. These procedures shall be applied in such a manner as to avoid the creation of obstacles to legitimate trade and provide safeguards against abuse.

(ii) Procedures for enforcing intellectual property rights shall be fair and equitable.

(iii) Decisions on the merits of a case shall, as a general rule, be in writing and reasoned. They shall be made known at least to the parties to the dispute without undue delay.

(iv) Each Party shall provide an opportunity for judicial review of final administrative decisions on the merits of an action concerning the protection of an intellectual property right. Subject to jurisdictional provisions in each Party's laws concerning the importance of a case, an opportunity for judicial review of the legal aspects of initial judicial decisions on the merits of a case concerning the protection of an intellectual property right shall also be provided.

(v) Notwithstanding the other provisions of paragraph 2(f), when a Party to this Agreement is



sued with respect to infringement of an intellectual property right as a result of the use of that right by or for the government, the Party may limit remedies against the government to payment of full compensation to the right-holder.

3. For purposes of this Agreement:

(a) "right-holder," includes the right-holder himself, any other natural or legal person authorized by him who are exclusive licensees of the right, or other authorized persons, including federations and associations, having legal standing under domestic law to assert such rights;

(b) "A manner contrary to honest commercial practice" is understood to encompass, inter alia, practices such as theft, bribery, breach of contract, inducement to breach, electronic and other forms of commercial espionage, and includes the acquisition, use or disclosure of trade secrets by third parties who knew, or had reasonable grounds to know, that such practices were involved in their acquisition of such information.

(c) "Integrated circuit" means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

4. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this letter shall be construed to prohibit the adoption or enforcement by a Party of measures necessary to secure compliance with laws or regulations relating to the protection and enforcement of intellectual property rights and the prevention of deceptive practices as set out in this letter.

5. Each Party agrees to submit for enactment no later than December 31, 1993 the legislation necessary to carry out the obligations of this letter and to exert its best efforts to enact and implement this legislation by that date.

6. The Parties acknowledge that, under the existing Romanian law, it is not possible to fully implement the provisions of this letter. Accordingly, the Government of Romania has undertaken the obligation set forth in paragraph 5 of the side letter to submit and exert best efforts to

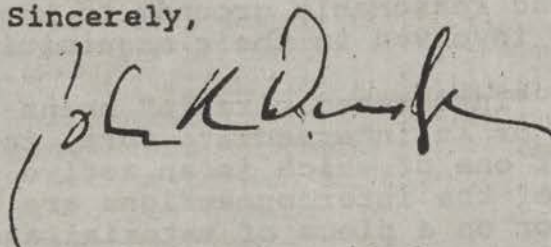


enact and implement amendments to existing laws or enact new laws. Pending the enactment of such amendments or new laws which fully implement the provisions of the exchange of letters, if it is brought to the attention of the Romanian Government by the Government of the United States that existing laws are being applied in a manner inconsistent with this side letter, the Government of Romania shall promptly take appropriate steps to rectify the inconsistency, including accelerating the introduction and implementation of such amendments and new laws.

I have the further honor to propose this understanding be treated as an integral part of the Agreement. I would be grateful if you would confirm that this understanding is shared by your Government.

I have the further honor to confirm that the foregoing understanding is shared by my Government and constitutes an integral part of the Agreement.

Sincerely,



[FR Doc. 92-15037

Filed 6-22-92; 3:39 pm]

Billing code 3190-01-C



# Rules and Regulations

Federal Register

Vol. 57, No. 122

Wednesday, June 24, 1992

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Part 92

[Docket No. 91-123-2]

#### Veterinarians Accredited by the Mexican Government

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are allowing veterinarians accredited by the Mexican government to perform official functions in connection with animals being exported from Mexico for importation into the United States. This action will ensure that an adequate number of qualified and competent individuals are available to perform functions required by the regulations governing the importation of animals into the United States.

**EFFECTIVE DATE:** July 24, 1992.

#### FOR FURTHER INFORMATION CONTACT:

Dr. Samuel Richeson, Senior Staff Veterinarian, Import-Export Products Staff, VS, APHIS, USDA, room 764, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8590.

#### SUPPLEMENTARY INFORMATION:

##### Background

APHIS regulates the importation of certain animals into the United States. The requirements for importation, found in 9 CFR part 92, provide that a "salaried veterinarian of the national government of the country of origin," or the equivalent, conduct specific tests or examinations of animals, and issue certificates for animals intended for export to the United States.

The Ministry of Agriculture for Mexico has recently developed a system for accrediting veterinarians who are

not salaried employees of the national government of Mexico to perform official work in connection with the export of animals from Mexico. This work includes testing, examining, and certifying animals for export to the United States. APHIS officials believe, based on their review of this system, that Mexican accredited veterinarians will be able to perform certain necessary services that are required by our regulations to prevent the introduction of communicable animal disease into the United States through the entry of animals.

Therefore, on January 28, 1992, we published in the *Federal Register* (57 FR 3145-3147, Docket Number 91-123) a proposed rule to amend 9 CFR part 92 to allow veterinarians accredited by the Mexican government to perform official work in connection with the export of animals from Mexico into the United States. Specifically, we proposed to allow veterinarians accredited by the Mexican government to issue animal health certificates required by the regulations for the importation of animals from Mexico into the United States. However, we also proposed that each certificate issued by a veterinarian accredited by the Mexican government also be endorsed by a full-time salaried veterinary officer of the national government of Mexico. Under this system the accredited veterinarian would make the necessary determinations about the animal's health and issue the certificate, and the Mexican government veterinarian would endorse it, indicating that the issuing veterinarian was authorized to do so. A correction to this document was published in the *Federal Register* on February 13, 1992 (57 FR 5294).

Our proposal invited the submission of written comments, which were required to be received on or before March 30, 1992. We received no comments. Based on the rationale set forth in the proposal, we are adopting the provisions of the proposal as a final rule.

#### Executive Order 12291 and Regulatory Flexibility Act

This rule has been reviewed in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an

effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule will have no effect on the economy of the United States or on any entities in the United States. It will allow the Mexican national government to make use of the services of accredited veterinarians to perform certain duties currently performed by salaried veterinarians of the Mexican national government.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR 3015, subpart V.)

#### Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging its provisions.

#### Paperwork Reduction Act

In accordance with section 3507 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the information collection provisions that are included in this final rule have been submitted for approval to the Office of Management and Budget. Your written comments will be considered if you submit them to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. You should submit a duplicate copy of your



comments to: (1) Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782 and (2) Clearance Officer, OIRM, USDA, room 404-W, 14th Street and Independence Avenue, SW., Washington, DC 20250.

#### List of Subjects in 9 CFR Part 92

Animal disease, Canada, Imports, Livestock and livestock products, Mexico, Poultry and poultry products, Quarantine, Transportation, Wildlife.

Accordingly, 9 CFR part 92 is amended as follows:

#### PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY AND CERTAIN ANIMAL AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

1. The authority citation for part 92 continues to read as follows:

Authority: 7 U.S.C. 1622; 19 U.S.C. 1306; 21 U.S.C. 102-105, 111, 134a, 134b, 134c, 134d, 134f and 135; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(d).

#### § 92.101 [Amended]

2. In § 92.101, paragraph (c)(3)(i), in the first sentence, the phrase “, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately following the phrase “country of export”.

#### § 92.104 [Amended]

3. In § 92.104, paragraph (a), in the first sentence, the phrase “or accredited” is added immediately following “issued by a veterinarian authorized”.

#### § 92.205 [Amended]

4. In § 92.205, in both the first and last sentence, the phrase “, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately preceding the phrase “stating that”.

#### § 92.301 [Amended]

5. In § 92.301, paragraph (c)(2)(iv) introductory text, the phrase “or accredited” is added immediately following “signed by a veterinarian authorized”.

6. In § 92.301, paragraph (c)(2)(vi)(A)(2), the phrase “or accredited” is added immediately following “signed by a veterinarian authorized”.

7. In § 92.301, paragraphs (c)(2)(vii)(B) introductory text and (C), the phrase “or accredited” is added immediately following “signed by a veterinarian authorized”.

8. In § 92.301, paragraph (c)(2)(xi)(C)(4) introductory text, the phrase “or accredited” is added immediately following “signed by a veterinarian authorized”.

#### § 92.314 [Amended]

9. In § 92.314, in the first sentence, the phrase “, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately preceding the phrase “showing that”.

#### § 92.326 [Amended]

10. In § 92.326, in the first sentence, the phrase “, or by a certificate issued by a veterinarian accredited by the Mexican Government and endorsed by a salaried veterinarian of the Mexican Government, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately following the phrase “Mexican Government”.

#### § 92.405 [Amended]

11. In § 92.405, paragraph (a), the phrase “, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately preceding the phrase “stating that”.

12. In § 92.405, paragraph (b)(i), the phrase “or accredited veterinarian” is added immediately following “said salaried veterinary officer”.

#### § 92.406 [Amended]

13. In § 92.406, paragraph (a), the phrase “, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately preceding the phrase “showing that”.

14. In § 92.406, paragraph (b), the phrase “, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added immediately preceding the phrase “showing that”.

#### § 92.427 [Amended]

15. In § 92.427, paragraphs (b)(1), (b)(2)(i), and (b)(2)(ii), the phrase “certificate of a salaried veterinarian of the Mexican Government” is removed and the phrase “certificate issued by a full-time salaried veterinary officer of the National Government of Mexico, or issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so,” is added in its place.

16. In § 92.427, in paragraph (c)(1), “has been tested with negative results by a salaried veterinarian of the National Government of Mexico” is revised to read “has been tested with negative results either by a salaried veterinarian of the National Government of Mexico or by a veterinarian accredited by the National Government of Mexico,”; and “they are accompanied by a health certificate, issued by a salaried veterinarian of the Government of Mexico” is revised to read “they are accompanied by a health certificate, issued by a salaried veterinarian of the Government of Mexico, or issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the



veterinarian issuing the certificate was authorized to do so."

17. In § 92.427, paragraphs (d)(1) introductory text and (e)(2), the phrase "certificate of a salaried veterinarian of the Mexican Government" is removed and the phrase "certificate issued by a salaried veterinarian of the Government of Mexico, or issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so," is added in its place.

#### § 92.428 [Amended]

18. In § 92.428, in paragraph (a), the phrase "certificate of a salaried veterinarian of the Mexican Government" is removed and the phrase "certificate issued by a salaried veterinarian of the Government of Mexico, or issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so," is added in its place.

#### § 92.429 [Amended]

19. In § 92.429, the phrase "certificate of a salaried veterinarian of the Mexican Government" is removed and the phrase "certificate issued by a salaried veterinarian of the Government of Mexico, or issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so," is added in its place.

#### § 92.505 [Amended]

20. In § 92.505, in paragraph (a), the phrase ", or if exported from Mexico," shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so," is added immediately preceding the phrase "stating that".

Done in Washington, DC, this 18th day of June 1992.

Robert Melland,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 92-14730 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-34-M

### 9 CFR Part 96

[Docket No. 89-018-2]

#### Signature on Certificates Accompanying Foreign Animal Casings

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

**SUMMARY:** We are amending the regulations concerning the importation of animal casings by removing the requirement that certificates accompanying animal casings imported into the United States bear the signature of the national government official having jurisdiction over the health of animals in the country in which the casings originate. We have determined that the signature of a government official at this high level is unnecessary. We are also making several changes in the regulations for clarification. These changes will simplify the importation process for foreign animal casings, while adequately ensuring that foreign casings do not present a risk of introducing livestock diseases into the United States.

**EFFECTIVE DATE:** July 24, 1992.

**FOR FURTHER INFORMATION CONTACT:** Dr. John H. Blackwell, Senior Staff Microbiologist, Import-Export Products Staff, VS, APHIS, USDA, room 758, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-7834.

#### SUPPLEMENTARY INFORMATION:

##### Background

Animal casings are intestines, stomachs, esophagi, and urinary bladders for cattle, sheep, swine, or goats that are used to encase processed meats in food, such as sausage. The regulations in 9 CFR part 96 (referred to below as "the regulations") govern the importation of animal casings into the United States to prevent the introduction of contagious livestock diseases.

Prior to the effective date of this document, the regulations required that animal casings imported into the United States be accompanied by a "Foreign Official Certificate for Animal Casings" (certificate), bearing two official signatures. One signature required was

that of the national government official having jurisdiction over the health of animals in the country in which the casings originate (referred to below as the high government official). This official's jurisdiction with respect to the health of animals in the foreign country is comparable to the jurisdiction of the Secretary of the United States Department of Agriculture. The other official signature required on the certificate was that of the official who actually issues the certificate, who may be any person authorized by the former official.

In a document published in the *Federal Register* on October 30, 1991 (56 FR 55846-55847, Docket Number 89-018), we proposed to remove the requirement for the high government official's signature. The signature of the official authorized to issue the certificate is still required. The government of the country exporting the animal casings will remain accountable for the accuracy and validity of the representations of the official authorized to issue the certificate. To clarify and strengthen this official's responsibilities we also proposed to:

(1) Add a list of definitions under a new § 96.1.

(2) Remove the term "country in which the casings originate(d)," wherever it appears, and replace it with the term "country in which the animals were slaughtered and the casings were collected".

(3) Require signatures on certificates to be original and remove language that allows printed or stamped signatures on certificates.

(4) Require that the individual who signs the certificate first inspect the casings.

(5) Require that the individual who signs the certificate be either (1) a veterinarian salaried by the national government of the country in which the animals were slaughtered and the casings were collected, and who is authorized by the national government to inspect casings and issue certificates; or (2) a non-government veterinarian authorized to issue the certificate by the national government of the country in which the animals were slaughtered and the casings were collected, if the certificate is endorsed by the government-salaried veterinarian described above. The endorsement of the government-salaried veterinarian will serve as the official endorsement of the national government, thereby assuring the Animal and Plant Health Inspection Service that the non-government veterinarian issuing the certificate is authorized to do so.



Comments on the proposed rule were required to be received on or before December 30, 1991. We did not receive any comments. Therefore, based on the rationale set forth in the proposal, we are adopting the provisions of the proposal as a final rule without change.

#### *Executive Order 12291 and Regulatory Flexibility Act*

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Importers of foreign animal casings will be affected by this action. These importers are both large and small entities, and include brokers, casings plants, and sausage producers. Removing the requirement for the signature of the high government official having jurisdiction over animal health matters will remove a regulatory burden from these entities—a regulatory burden which, in some instances, has caused delays in the importation of animal casings.

Removing this burden will simplify the importation process for importers of animal casings, and remove the potential for shipments of animal casings to be delayed because the signature of the high government official was inadvertently left off the certificate. As a result, importers of animal casings could experience some economic benefit. The value of the economic benefit will not be significant in terms of the overall cost of importing the animal casings since this action will simply remove one potential source of delay in the importation process.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### *Executive Order 12372*

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires

intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

#### *Executive Order 12778*

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging its provisions.

#### *Paperwork Reduction Act*

Information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act (44 U.S.C. 3591 *et seq.*) and have been assigned OMB control number 0579-0015.

#### **List of Subjects in 9 CFR Part 96**

Imports, Livestock and livestock products, Reporting and recordkeeping requirements, Transportation.

Accordingly, 9 CFR part 96 is amended as follows:

#### **PART 96—RESTRICTION OF IMPORTATIONS OF FOREIGN ANIMAL CASINGS OFFERED FOR ENTRY INTO THE UNITED STATES**

1. The authority citation for part 96 is revised to read as follows:

Authority: 21 U.S.C. 111; 7 CFR 2.17, 2.51, and 371.2(d).

#### **§ 96.4 [Removed]**

§§ 96.1–96.3 [Redesignated as §§ 96.2–96.4]

2. Section 96.4 is removed; §§ 96.1 through 96.3 are redesignated as §§ 96.2 through 96.4, respectively; and a new § 96.1 is added to read as follows:

#### **§ 96.1 Definitions.**

*Animal casings.* Intestines, stomachs, esophagi, and urinary bladders from cattle, sheep, swine, or goats that are used to encase processed meats in foods such as sausage.

*Department.* The United States Department of Agriculture.

*Import (imported, importation) into the United States.* To bring into the territorial limits of the United States.

*United States.* All of the States of the United States, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands of the United States, American Samoa, and the territories and possessions of the United States.

3. In redesignated § 96.2, the section heading and introductory text up to and including the colon are revised to read as follows; and the text under the heading "FOREIGN OFFICIAL CERTIFICATE FOR ANIMAL CASINGS" is amended by removing all text beginning with "(Signature)" and by adding the following text in its place:

#### **§ 96.2 Certificate for animal casings.**

(a) No animal casings shall be imported into the United States from any foreign country unless they are accompanied by a certificate signed by either (1) a veterinarian salaried by the national government of the country in which the animals were slaughtered and the casings were collected, and who is authorized by the national government to conduct casings inspections and issue certificates, and who has inspected the casings before issuing the certificate and determined that the casings meet the criteria described in the Foreign Official Certificate for Animal Casings; or (2) a non-government veterinarian authorized to issue the certificate by the national government of the country in which the animals were slaughtered and the casings were collected, who has inspected the casings before issuing the certificate and determined that the casings meet the criteria described in the Foreign Official Certificate for Animal Casings. A certificate issued by a non-government veterinarian is valid only if the certificate is endorsed by a veterinarian salaried by the national government of the country in which the animals were slaughtered and the casings were collected.

(b) All signatures on the certificate shall be original.

(c) The certificate shall bear the insignia of the national government of the country in which the animals were slaughtered and the casings were collected, and shall be in the following form:

\* \* \* \* \*

Signature: \_\_\_\_\_  
 Official issuing the certificate. (Non-government veterinarian authorized to issue the certificate by the national government of the country in which the animals were slaughtered and the casings were collected.)  
 Official title: \_\_\_\_\_  
 Signature: \_\_\_\_\_  
 Official issuing the certificate. (Veterinarian salaried by the national government of the country in which the animals were slaughtered and the casings were collected.)  
 Official title: \_\_\_\_\_  
 (Approved by the Office of Management and Budget under control numbers 0579-0015)



**§ 96.3 [Amended]**

3. In redesignated § 96.3, in the last line, "§§ 96.3" is changed to read "§§ 96.4".

**§ 96.4 [Amended]**

5. In redesignated § 96.4, the introductory text and paragraph (a) are removed and paragraphs (b), (c), (d), and (e) are redesignated as paragraphs (a), (b), (c), and (d), respectively.

Done in Washington, DC, this 18th day of June 1992.

Robert Melland,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 92-14816 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-34-M

**Food Safety and Inspection Service****9 CFR Part 381**

[Docket No. 90-012F]

RIN 0583-AB28

**Poultry Products Containing Pork; Trichinae Treatment**

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is amending the Federal poultry products inspection regulations to provide that poultry products containing pork as an ingredient are subject to the same trichinae treatment requirements as those specified in the Federal meat inspection regulations for meat products consisting of mixtures of pork and other ingredients. The rule eliminates inconsistencies in the meat and poultry products inspection regulations regarding trichinae treatment measures. The action is the result of a petition from Sara Lee Corporation of Chicago, Illinois.

**EFFECTIVE DATE:** July 24, 1992.

**FOR FURTHER INFORMATION CONTACT:**

Mr. William C. Smith, Director, Processed Products Inspection Division, Science and Technology, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250 (202) 720-3840.

**SUPPLEMENTARY INFORMATION:****Executive Order 12778**

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. States and local jurisdictions are preempted under the Poultry Products Inspection Act (PPIA) from imposing any marking, labeling, packaging, or ingredient requirements

on federally inspected poultry products that are in addition to, or different than, those imposed under the PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over poultry products that are outside official establishments for the purpose of preventing the distribution of poultry products that are misbranded or adulterated under the PPIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States. Under the PPIA, States that maintain poultry inspection programs must impose requirements on State inspected products and establishments that are at least equal to those required under the PPIA. These States may, however, impose more stringent requirements on such State inspected products and establishments.

This rule is not intended to have retroactive effect. There are no applicable administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. However, the administrative procedures specified in 9 CFR 381.35 must be exhausted prior to any judicial challenge of the application of the provisions of this rule, if the challenge involves any decision of an inspector relating to inspection services provided under the PPIA.

**Executive Order 12291**

The Agency has determined that this rule is not a major rule under Executive Order 12291. It does not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in export or domestic markets.

**Effect on Small Entities**

The Administrator, FSIS, has determined that this rule does not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). The rule amends § 381.147 of the Federal poultry products inspection regulations (9 CFR 381.147) to provide, in part, that certain pork products, when used as ingredients in poultry products, are not required under certain specified conditions to receive treatment for the destruction of inspection regulations (9 CFR 381.10). The rule may benefit trichinae as provided in § 318.10 of the Federal meat

producers of poultry products containing pork ingredients by providing certain specified exemptions from the trichinae treatment requirements. However, the Agency has determined that the benefits are not significant, and the number of producers affected is not substantial.

**Background**

*Trichinella spiralis* or "trichina" is a parasitic worm that causes the disease trichinosis in virtually all warm blooded animals. The most common way for humans to acquire trichinosis is by ingesting undercooked pork or bear meat infected with trichina cysts. Trichinae exist in these meats as larval cysts. Approximately 0.125 percent of grain-fed swine and approximately 0.5 percent of garbage-fed swine are infected (Prevalence and Control of *Trichinella spiralis* in Swine and Pork Products, W. J. Zimmerman Public Health Reviews, Vol. 1, 1972). If a person or animal eats this infected meat, the larvae leave the digested cysts, mature into adults in the intestinal system of the person or animal, and mate. The females then produce live larvae that travel through the circulatory system, invade the victim's muscles, and form cysts. As encysted larvae, they survive until the cyst becomes calcified or the host dies. People with trichinosis suffer from diarrhea, shortness of breath, fever, and swelling. They can also suffer slight to extremely intense pain and death.

Section 318.10 of the Federal meat inspection regulations (9 CFR 318.10) requires that products containing raw pork must be treated for the destruction of trichinae unless the products will be fully cooked by the consumer or the raw pork has been found to be trichinae free. Treatment is not required unless there is the likelihood the product may not be fully cooked before being eaten. If such likelihood exists, the product must be treated by one of the methods prescribed in paragraph (c) of § 318.10.

On December 10, 1974, FSIS published a rule in the Federal Register (39 FR 42900) which amended § 381.147(d) of the Federal poultry products inspection regulations (9 CFR 381.147(d)) to provide that poultry products containing pork as an ingredient must be treated to destroy possible live trichinae by one of the methods prescribed in § 318.10(c) of the Federal meat inspection regulations (9 CFR 318.10(c)), or in lieu of such treatment the pork ingredient may be so treated. The regulation was promulgated in response to growing interest by processors to produce poultry products containing pork as an ingredient.



Generally, poultry products are fully cooked prior to consumption; however, there is the possibility that some, because of their appearance or because the label may not prominently identify the pork ingredient, may not be fully cooked before being eaten. In the latter instance, the possibility of human infection by live trichinae exists if the poultry product contains a pork ingredient, and the product is consumed raw, undercooked, or otherwise untreated for the destruction of this parasite.

Only the treatment provisions contained in § 318.10(c) of the Federal meat inspection regulations were made applicable to poultry products containing pork by the December 1974 regulation. However, the provisions in paragraphs (e) and (f) of § 318.10, under which pork could be found trichina free, were not made applicable. In addition, § 318.10(b), which provides that the Administrator has discretion to determine whether treatment is required to prevent sausage and certain other products prepared from a mixture of pork and other meat, from being eaten rare or without thorough cooking, also was not made applicable to poultry products containing pork.

On March 5, 1990, FSIS received a petition from Sara Lee Corporation of Chicago, Illinois, to amend § 381.147(d) of the poultry products inspection regulations to make applicable to poultry products containing pork as an ingredient all the provisions of § 318.10 of the meat inspection regulations regarding trichinae treatment. The petitioner contends that the language contained in § 381.147(d) results in inconsistent regulation of comparable meat and poultry products, that poultry products which contain pork as an ingredient are required to be treated as prescribed in § 318.10(c) of the meat inspection regulations, while similar meat products containing pork as an ingredient have alternatives under the provisions of paragraphs (b), (e), and (f) of § 318.10.

The Agency agrees that the Federal meat and poultry products inspection regulations are inconsistent on this point. Therefore, on December 4, 1990, FSIS published a proposal in the Federal Register (55 FR 50007) to amend § 381.147(d) of the poultry products inspection regulations (9 CFR 381.147(d)) to provide that certain pork products, when used as ingredients in poultry products, would not be required under certain specified conditions to receive treatment for the destruction of trichinae as provided in § 318.10 of the Federal meat inspection regulations. As with all-

meat products containing pork, the risk of trichinae is eliminated if product is thoroughly cooked. The hazard of inadvertent undercooking relates primarily to the appearance of the product. Consumers know when a product is cooked because of the change in color caused primarily by the denaturing of the proteins in the tissue. Various ingredients that may be added to sausages and similar products, ingredients like red wine or paprika, will cause a "cooked" appearance before the product reaches the temperature at which any trichinae will be killed. When a decision must be made concerning whether a specific product could appear cooked before it is, it would be referred to the Agency Trichina Committee. The Committee cooks a sample of the product under controlled conditions and assesses all the characteristics of the product, including the appearance, the ingredients, the name and the cooking characteristics. If the Committee concludes that the product may appear cooked when it is not, the pork ingredient will have to be treated. Currently, for all-meat products, the Committee conducts about two tests a month. The Agency anticipates that the need to test new poultry products with pork ingredients will increase the number of such tests to three or four per month.

#### Analysis of Comments

The Agency received four comments in response to the December 1990 proposal. Three comments supported the proposal, and one opposed it. One was from the National Turkey Federation, one from an individual, and a sausage division of a major national food company sent in a written comment and also provided an oral comment. The issues raised by the comments and the Agency responses are as follows:

1. Two commenters were concerned that the phrase "ground poultry mixtures containing pork muscle tissues" as proposed in § 381.147(d)(3) would needlessly impede future product development because, as proposed, it appears to limit the type of poultry that may be used.

The Agency agrees and has changed the rule to eliminate the phrase "ground poultry mixture". Instead, the phrase "poultry products containing pork muscle tissues" is used. The Agency has determined that this phrase includes ground poultry mixtures and will therefore serve the same regulatory purpose and still permit future product development.

2. One commenter suggested that several technical changes be made for clarity and to provide complete

consistency between the poultry products inspection regulations and the meat inspection regulations. Specifically, the commenter stated that § 381.147(d)(1) and (d)(3) of the proposed regulations were contradictory in that paragraph (d)(1) seemed to require treatment for trichinae destruction and paragraph (d)(3) permitted exceptions to trichinae destruction treatment.

The Agency agrees with the commenter and has clarified the final regulation.

3. One commenter stated that any rule in this area should provide for control of all infectious pathogens such as *Listeria monocytogenes* and *Salmonella* epidemiologically associated with raw pork and poultry, if the Administrator determines that a product might be eaten raw or without thorough cooking. The commenter stated that treatment for trichinae is inadequate to kill other infectious bacteria because other such bacteria are more resistant to heat, refrigeration, or curing than trichinae. The commenter stated that if all pathogens could not be considered, then the Agency should withdraw the proposal.

The Agency disagrees that the proposal should be withdrawn if all infectious pathogens are not considered by this rulemaking proceeding. The Agency agrees that other pathogens mentioned by the commenter should be considered when dealing with raw product; however, such issues go beyond the scope of this rulemaking.

4. One commenter stated that even if pork had been certified trichina free under the Enzyme-Linked Immunosorbent Assay (ELISA) test and, therefore, exempt from treatment under the Federal meat inspection regulations, the poultry products inspection regulations require the product to be treated.

The Agency agrees that inconsistencies exist under the current regulations. This rule corrects those inconsistencies. However, it should be noted that ELISA does not provide assurance of trichina-free pork and only has merit in a program of trichina eradication. The only acceptable test so far to certify pork trichina free is the pooled sample digestion technique.

5. One comment referred to the preamble of the proposal citing appearance of product as the rationale for trichinae treatment, and stated that a processor could show the product would not look fully cooked before it is, in fact, so cooked.

It is true that appearance was given as a basis for the rule, but appearance is



not the sole criterion for requiring treatment. Another concern is that if pork is used in a meat mixture, the labeling may not prominently identify the pork ingredient. The information that consumers have about cooking pork thoroughly may not be readily applied to an item labeled as a "meat loaf", for example. The possibility of undercooking pork increases if it is mixed in a product not clearly labeled as "pork".

#### List of Subjects in 9 CFR Part 381

Poultry products inspection;  
Processing requirements; Trichinae treatment.

### PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 450; 21 U.S.C. 451-470; 601-695; 33 U.S.C. 1254; 7 CFR 2.17, 2.55.

2. Section 381.147 is amended by designating the first sentence of paragraph (d) as (d)(1) and revising it, designating and revising the remaining contents of that paragraph as (d)(2), and adding a new paragraph (d)(3) to read as follows:

#### § 381.147 Restrictions on the use of substances in poultry products.

(d)(1) Carcasses, parts thereof, meat and meat food products of cattle, sheep, swine, goats, or equines may be used in the processing of poultry products only if they were prepared in the United States only in an official meat packing establishment, or imported, and were inspected and passed, in accordance with the Federal Meat Inspection Act, and the regulations under such Act (subchapter A of this chapter) and are so marked.

(2) Pork from carcasses or carcass parts, used as an ingredient in poultry products, that has been found free of trichinae, as described under § 318.10 (a)(2), (e) and (f) of the Federal meat inspection regulations (9 CFR 318.10 (a)(2), (e) and (f)), is not required to be treated for the destruction of trichinae.

(3) Poultry products containing pork muscle tissue which the Administrator determines at the time the labeling for the product is submitted for approval in accordance with part 381 of the regulations in subchapter C, or upon subsequent reevaluation of the product, would be prepared in such a manner that the product might be eaten rare or without thorough cooking because of the appearance of the finished product or otherwise, shall be effectively heated, refrigerated, or cured to destroy any

possible live trichinae, as prescribed in § 318.10(c) of the Federal meat inspection regulations (9 CFR 318.10(c)), at the official establishment where such products are prepared. In lieu of such treatment of poultry products containing pork, the pork ingredient may be so treated.

Done at Washington, DC on: June 18, 1992.

Donald L. White,

Acting Administrator, Food Safety and Inspection Service.

[FR Doc. 92-14800 Filed 6-23-92; 8:45 am]

BILLING CODE 3140-DM-M

### NATIONAL CREDIT UNION ADMINISTRATION

#### 12 CFR Parts 704 and 741

#### Corporate Credit Unions and Requirements for Insurance; Correction

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule; correction.

SUMMARY: In the Federal Register of May 28, 1992, beginning on page 22626, a final rule concerning part 704 (corporate credit unions) and § 741.9 (criteria for requirements for insurance) of the NCUA Regulations was published. Several inadvertent errors were made in the regulatory language. This document makes the corrections.

EFFECTIVE DATE: December 1, 1992.

ADDRESSES: National Credit Union Administration, 1776 G Street, NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: D. Michael Riley, Director, or Ronald Alf, Corporate Credit Union Specialist, (202) 682-9640, or Lisa Henderson, Staff Attorney, Office of General Counsel (202) 682-9630, at the above address.

Dated: June 11, 1992.

Becky Baker,

Secretary, NCUA Board.

In final rule document 92-12074, beginning on page 22626, in the issue of Thursday, May 28, 1992, the following corrections are made:

1. On page 22629, third column, last line of the second full paragraph, delete the apostrophe.

2. On page 22630, third column, § 704.1, the existing text is designated as paragraph (a) and a new paragraph (b) is added to read as follows:

#### § 704.1 Scope.

(b) The NCUAB has the authority to issue orders which vary from this part.

This authority is provided under section 120(a) of the Federal Credit Union Act, 12 U.S.C. 1766(a).

3. On page 22631, second column, § 704.2, in the definition "Membership capital share deposit (MCSD)", fourth line of the concluding text, add the words "MCSD account" before the word "funds".

4. On page 22633, first column, § 704.6, revise paragraph (b)(2)(vi)(A) to read as follows:

#### § 704.6 Investment.

(b) \* \* \*

(2) \* \* \*

(vi) \* \* \*

(A) *Fixed-rate.* An investment in a fixed-rate CMO/REMIC must have an expected average life not to exceed 5 years given an immediate and sustained increase of 300 basis points in mortgage loan commitment rates. This average life standard shall apply at the time of purchase and on any subsequent review date assuming market interest rates and prepayment speeds at the time that the test is applied. A corporate credit union shall use the average of the prepayment estimates of several major securities dealers as the prepayment assumption for the underlying mortgages. In computing the expected average life of a CMO/REMIC investment, it must be assumed that the anticipated rate of prepayment remains constant over the remaining life of the mortgage collateral. This limitation does not apply if principal payments of the investment are specifically matched to principal payments of the corresponding liability.

5. On page 22633, second column, § 704.6(d), revise the first sentence to read as follows:

#### § 704.6 Investment.

(d) \* \* \* The corporate credit union has 10 business days to divest itself of any investment that does not comply with the requirements of this section or to request permission from the NCUAB to hold the investment. \* \* \*

#### § 704.7 [Corrected]

6. On page 22633, second column, third line from the bottom, add the words "credit union" after the word "corporate" in the heading of § 704.7(b)(3).

7. On page 22633, third column, first line, add the words "credit union" after the word "corporate" in § 704.7(b)(3).



**§ 704.10 [Corrected]**

8. On page 22634, first column, 13th line of § 704.10(b)(2), add the phrase "Office of Examination and Insurance," after the comma.

**§ 704.11 [Corrected]**

9. On page 22634, second column, third line in § 704.11(i), add the word "be" after "will".

**§ 704.12 [Corrected]**

10. On page 22635, first column, revise § 704.12(c)(2) to read as follows:

**§ 704.12 Representation.**

\* \* \*

(c) \* \* \*

(2) No director, officer, agent, or employee shall in any manner participate in the determination of any matter material in amount (when measured annually as an aggregate of business arrangements with the corporation, partnership, or association) affecting the pecuniary interest of any corporation, partnership, or association (other than the corporate credit union) in which he/she has a direct or indirect interest, except if the matter involves the payment of dividends to the membership.

11. On page 22635, first column, § 704.12(c)(5), second line from the bottom, replace the phrase "Any directors, officers, agents, or employees which participate" with "If any director, officer, agent, or employee participates".

12. On page 22635, second column, § 704.12(c)(5), line nine, add ", that matter" after the word "interest" and in line twelve, add the word "approved" after the word "Such".

**Appendix A [Corrected]**

13. On page 22636, first column, paragraph a. of *Category 3: 50 Percent Risk Weight* of Appendix A is revised to read as follows:

"a. Asset-backed securities rated no lower than AAA with remaining weighted average lives greater than 3 years."

**§ 741.9 [Corrected]**

14. On page 22637, § 741.9(a)(3), fifth line, add the words "and applicable state laws and regulations" after the word "Regulations".

15. On page 22637, § 741.9(b)(3), last line, add the words "and applicable state laws and regulations" after the word "Regulations".

[FR Doc. 92-14761 Filed 6-23-92; 8:45 am]

BILLING CODE 7535-01-M

**DEPARTMENT OF VETERANS AFFAIRS****38 CFR Part 21**

RIN: 2900-AD 76

**Extension of Vocational Programs for Seriously Disabled Veterans; Correction**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Correcting amendment.

**SUMMARY:** The Department of Veterans Affairs published final regulations amending its regulations governing two programs which provide vocational services to seriously disabled veterans receiving pension or individual unemployability benefits from VA on April 24, 1990. The changes to the program providing vocational services to veterans receiving individual unemployability benefits required the amendment of § 21.6005. This change is intended to correct an error in the amendment of § 21.6005.

**EFFECTIVE DATE:** November 18, 1988.

**FOR FURTHER INFORMATION CONTACT:** Morris Triestman, (202) 233-6496, Rehabilitation Consultant, Policy and Program Development, Vocational Rehabilitation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington DC 20420.

**SUPPLEMENTARY INFORMATION:** The revision of § 21.6005 required the redesignation of a number of paragraphs. Paragraphs (d), (e), (f), (g) and (h) were redesignated as Paragraphs (e), (f), (g), (h), and (i) respectively. The existing paragraph (i) should have been redesignated as paragraph (j), but was not. The failure to redesignate the existing paragraph (i) as paragraph (j) is corrected by this change.

(The Catalog of Federal Domestic Assistance numbers are 64.109 and 64.116)

**List of Subjects in 38 CFR Part 21**

Civil rights, Claims, Education, Grant programs, Loan programs, Reporting requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Dated: June 18, 1992.

Patti Viers,  
Chief, Forms Correspondence and Mail  
Management Division.

**PART 21—VOCATIONAL REHABILITATION AND EDUCATION**

38 CFR part 21, Vocational Rehabilitation is corrected as follows:

1. The authority citation for subpart I continues to read as follows:

Authority: Public Law 98-543, 38 U.S.C. 210 and chapter 15, sections specifically cited.

**§ 21.6005 [Corrected]**

2. In § 21.6005 paragraph (i) with title "Other terms" is redesignated as paragraph (j).

[FR Doc. 92-14806 Filed 6-23-92; 8:45 am]

BILLING CODE 8320-01-M

**38 CFR Part 21**

RIN 2900-AD63

**Veterans Education; Veterans' Employment, Training and Counseling Amendments of 1988**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains corrections to the final regulations which were published Friday, December 1, 1989 (54 FR 49755). The regulations implemented provisions of the Veterans' Employment, Training and Counseling Amendments of 1988.

**EFFECTIVE DATE:** May 20, 1988.

**FOR FURTHER INFORMATION CONTACT:** June C. Schaeffer (225), Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-2092.

**SUPPLEMENTARY INFORMATION:****Background**

The final regulation which is the subject of this correction was included among many amended regulations which were needed to implement Public Law 100-323.

**Need for Correction**

As published the amended regulations included new language for § 21.4154(b)(3). However, the amendatory language which preceded the amendments to § 21.4154 did not indicate that paragraph (b)(3) was being revised. Consequently, the current Code of Federal Regulations contains the language for (b)(3) which was in effect before Public Law 100-323 was enacted. This has caused considerable confusion among the users of the regulations. This correction eliminates the confusion by repeating the language that was published on December 1, 1989.



**List of Subjects in 38 CFR Part 21**

Civil rights, Claims, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Dated: June 18, 1992.

Patti Viers,

Chief, Forms Correspondence and Mail Management Division.

**PART 21—VOCATIONAL REHABILITATION AND EDUCATION****Subpart D—Administration of Educational Benefits; 38 U.S.C. Chapters 34, 35, and 36**

Accordingly, 38 CFR part 21, subpart D is corrected by making the following correcting amendments.

1. The authority citation of part 21, subpart D continues to read as follows:

Authority: 72 Stat. 1114; 38 U.S.C. 501(a).

2. In § 21.4154 paragraph (b)(3) is correctly revised to read as follows:

**§ 21.4154 Report of activities.**

(b) *Content of the Report.* \* \* \*

(3) May include, at the option of the State approving agency, a cumulative report of its activities from the beginning of the fiscal year to date;

[FR Doc. 92-14807 Filed 6-23-92; 8:45 am]

BILLING CODE 8320-01-M

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Chapter I**

[OPPTS-00120; FRL 4056-3]

**Nomenclature changes**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** On December 15, 1991 the Office of Pesticides and Toxic Substances was renamed the Office of Prevention, Pesticides and Toxic Substances (OPPTS), and the Office of Toxic Substances was renamed the Office of Pollution Prevention and Toxics. These changes were made necessary by the passage of the Pollution Prevention Act of 1990, 42 U.S.C. 13101-13109, which requires that EPA, among other things, carry out the national policy of the United States, to prevent or reduce pollution whenever feasible. The changes in nomenclature

are necessary to reflect the Agencies new areas of concentration.

**EFFECTIVE DATE:** These amendments are effective retroactively to December 15, 1991.

**FOR FURTHER INFORMATION CONTACT:**

Susan Hazen, Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics, (TS-799), 401 M St., SW., Washington, DC, Rm. E-543B, telephone: (202) 554-1404, TDD: (202) 554-0551.

**SUPPLEMENTARY INFORMATION:** Under general rulemaking authority, 5 U.S.C. 552, EPA is issuing this technical amendment to make nomenclature changes to regulations in 40 CFR chapter I. EPA is changing the name of the Office of Pesticides and Toxic Substances and the Office of Toxic Substances to the Office of Prevention, Pesticides and Toxic Substances and the Office of Pollution Prevention and Toxics, respectively. The new name reflects the emphasis that the U.S. Congress places on "pollution prevention" as is reflected in section 6602(b) of the Pollution Prevention Act of 1990 (PPA), 42 U.S.C. 13101(b), which states in part that the "Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible:...." The new name also reflects the fact that the former Office of Toxic Substances in the Office of Pesticides and Toxic Substances will have primary responsibility for implementing PPA.

**I. Public Record**

A public record for the action has been established under docket number "OPPTS-00120". The public record is available for inspection from 8 am to 12 noon, and 1 pm to 4 pm, Monday through Friday, excluding legal holidays. The public record is located in the OPPT Public Docket Room, Room G004, Northeast Mall, 401 M St., SW., Washington, DC 20460. The public record for this action consist of a copy of this document and a copy of Public Law 101-508.

**II. Other Regulatory Requirements****A. Executive Order 12291**

Under Executive Order 12291, EPA is required to determine whether a rule is "major" and subject to a Regulatory Impact Analysis. EPA has determined that this action is not major as that term is defined in section 1(b) of Executive Order 12291, and that it will not have any impact on the economy.

This rule was not submitted to the Office of Management and Budget for review

**B. Regulatory Flexibility Act**

EPA has determined that this rule is not subject to review under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq.

**C. Paperwork Reduction Act**

EPA has determined that this rule is not subject to OMB review under the Paperwork Reduction Act.

Dated: June 15, 1992.

Victor J. Kimm,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, based on the general rulemaking authority in 5 U.S.C. 552, 40 CFR chapter I, is amended as follows:

**CHAPTER I—[AMENDED]**

Chapter I is amended as follows:

1. By revising "Office of Pesticides and Toxic Substances", and "Office of Toxic Substances", to read "Office of Prevention, Pesticides and Toxic Substances," and "Office of Pollution Prevention and Toxics", respectively, wherever they appear in 40 CFR chapter I.

2. By revising the acronyms "OTS," and "OPTS," to read "OPPT," and "OPPTS", respectively, wherever appear in 40 CFR chapter I.

3. By revising "Assistant Administrator for Pesticides and Toxic Substances," to read "Assistant Administrator for Prevention, Pesticides and Toxic Substances," wherever this title appears in 40 CFR chapter I.

4. By revising "Assistant Administrator for the Office of Pesticides and Toxic Substances," to read "Assistant Administrator for Prevention, Pesticides and Toxic Substances," wherever this title appears in 40 CFR chapter I.

5. By revising "Assistant Administrator of the Office of Pesticides and Toxic Substances," to read "Assistant Administrator for Prevention, Pesticides and Toxic Substances," wherever this title appears in 40 CFR chapter I.

6. By revising "Assistant Administrator for Toxic Substances," to read "Assistant Administrator for Prevention, Pesticides and Toxic Substances," wherever this title appears in 40 CFR chapter I.

7. By revising "TSCA Assistance Office, (TS-799), Office of Toxic Substances," to read "Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics," wherever that phrase appears in 40 CFR chapter I.



8. By revising "OPTS Reading Room," to read "OPPT Reading Room," and "OTS Reading room," to read "OPPT Reading Room," respectively, wherever these phrases appear in 40 CFR chapter I.

These changes are effective on December 15, 1991.

[FR Doc. 92-14853 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-F

#### 40 CFR Part 52

[CA-12-9-5326; FRL-4144-6]

#### Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision for Kern County, Placer County, San Diego County, and San Joaquin Valley Unified Air Pollution Control Districts

**AGENCY:** U.S. Environmental Protection Agency (EPA).

**ACTION:** Direct final rulemaking.

**SUMMARY:** EPA is taking direct final action on revisions to the California State Implementation Plan (SIP) adopted by the above named districts. The California Air Resources Board submitted these four revisions to EPA on April 5, 1991, May 31, 1991, and January 28, 1992. The revisions concern cutback asphalt rules which control the emissions of volatile organic compounds (VOCs) from cutback asphalt manufacture and use. EPA has evaluated the revisions and is approving them under section 110(k)(3) as meeting the requirements of Section 110 (a) and Part D of the Clean Air Act, as amended in 1990 (CAA or the Act).

**DATES:** This action will be effective August 24, 1992 unless notice is received within 30 days of publication that adverse or critical comments will be submitted. If the effective date is delayed timely notice will be published in the Federal Register.

**ADDRESSES:** Comments may be mailed to: Esther Hill, Northern California, Nevada, and Hawaii Rulemaking Section (A-5-4), Air and Toxics Division, Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Copies of the rule revisions and EPA's evaluation report of each rule are available for public inspection at EPA's Region 9 office during normal business hours. Copies of the submitted rule revisions are also available for inspection at the following locations:

California Air Resources Board,  
Stationary Source Division, Rule  
Evaluation Section, 1219 "K" Street,  
Sacramento, CA 95814.

Kern County Air Pollution Control  
District, 2700 "M" Street, suite 275,  
Bakersfield, CA 93301.

Placer County Air Pollution Control  
District, 11464 "B" Avenue, Auburn,  
CA 95603.

San Diego County Air Pollution Control  
District, 9150 Chesapeake Drive, San  
Diego, CA 92123-1095.

San Joaquin Valley Unified Air Pollution  
Control District, 1745 West Shaw,  
suite 104, Fresno, CA 93711.

Public Information Reference Unit, EPA  
Library, 401 "M" Street, SW.,  
Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:**  
Julie A. Rose, Northern California,  
Nevada, and Hawaii Rulemaking  
Section (A-5-4), Air and Toxics  
Division, Environmental Protection  
Agency, 75 Hawthorne Street, San  
Francisco, CA 94105, Telephone: 415-  
744-1184, FAX: 415-744-1076.

#### SUPPLEMENTARY INFORMATION:

##### Background

On March 3, 1978, EPA promulgated a list of ozone nonattainment areas under the provisions of the 1977 Clean Air Act (1977 Act or pre-amended Act), that included San Diego County Air Pollution Control District (APCD) and the following eight APCDs: Fresno County APCD, Kern County APCD<sup>1</sup>, Kings County APCD, Madera County APCD, Merced County APCD, San Joaquin County APCD, Stanislaus County APCD, and Tulare County APCD. 43 FR 8964, 40 CFR 81.305. On September 12, 1979, EPA promulgated an additional list of ozone nonattainment areas under the provisions of the 1977 Act that included the Placer County APCD. 44 FR 53081, 81.305. Because these areas were unable to meet the statutory attainment date of December 31, 1982, California requested under section 172(a)(2), and EPA approved, an extension of the attainment date to December 31, 1987.<sup>2</sup> 40 CFR 52.238. On May 26, 1988, EPA notified the Governor of California that the above districts' portions of the California State Implementation Plan (SIP) were inadequate to attain and maintain the ozone standard and requested that deficiencies in the existing SIP be corrected (EPA's SIP-Call). On November 15, 1990, the Clean

Air Amendments of 1990 were enacted (Pub. L. 101-549, 104 Stat. 2399, codified at 42 U.S.C. Sections 7401-7671q). In amended Section 182(a)(2)(A) of the CAA, Congress statutorily adopted the requirement that nonattainment areas fix their deficient reasonably available control technology (RACT) rules and established a deadline of May 15, 1991, for states to submit corrections of those deficiencies.

On March 20, 1991, the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) was formed. The SJVUAPCD has authority over the San Joaquin Valley Air Basin which includes all of the above eight counties except for the Southeast Desert Air Basin portion of Kern County. Thus, Kern County Air Pollution Control District (KCPCD) still exists, but only has authority over the Southeast Desert Air Basin portion of Kern County.

Section 182(a)(2)(A) applies to areas designated as marginal or above and requires such areas to adopt and correct RACT rules pursuant to pre-amendment Section 172(b) as interpreted in pre-amendment guidance.<sup>3</sup> The San Joaquin Valley Air Basin (now collectively known as the SJVUAPCD) and the Placer County APCD are classified as serious and the San Diego County APCD is classified as severe; therefore, these areas are subject to the RACT fix-up requirement and the May 15, 1991 deadline.<sup>4</sup> KCPCD was subject to EPA's SIP-Call, but was not subject to the RACT fix-up requirement and the May 15, 1991 deadline.<sup>5</sup>

<sup>3</sup> Among other things, the 1977 Act guidance consists of those portions of the proposed Post-1987 ozone and carbon monoxide policy that concern RACT. 52 FR 45044 (November 24, 1987); "Issues, Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations, Clarification to Appendix D of November 24, 1987 Federal Register Notice" (Blue Book) (Notice of Availability was published in the Federal Register on May 25, 1988); and the existing control technique guidelines (CTGs).

<sup>4</sup> The San Joaquin Valley Air Basin, San Diego County APCD, and the Placer County APCD retained their designation and were classified by operation of law pursuant to Section 107(d) and Section 181(a) on November 15, 1990. See 58 FR 56694 (November 6, 1991).

<sup>5</sup> KCPCD was not subject to the RACT fix-up requirement and the May 15, 1991 deadline because the Southeast Desert Air Basin portion of Kern County was not a pre-enactment nonattainment area, and thus, was not automatically designated nonattainment on the November 15, 1990. (See section 107(d)). However, the KCPCD is still subject to the requirements of EPA's SIP-Call because the SIP-Call included all of Kern County. The substantive requirements of the SIP-Call are the same as those of the statutory RACT fix-up requirement.

<sup>1</sup> At that time, Kern County included portions of two air basins: the San Joaquin Valley Air Basin and the Southeast Desert Air Basin. The San Joaquin Valley Air Basin portion of Kern County was designated as nonattainment, and the Southeast Desert Air Basin portion of Kern County was designated as unclassified. See 40 CFR 81.305 (1991).

<sup>2</sup> This extension was not requested for Kern County. Thus, Kern County's attainment date remained December 31, 1982.



On April 5, 1991, May 30, 1991, and January 28, 1992 the State of California submitted many revised RACT rules for incorporation into its SIP in order to comply with the SIP-Call and section 182(a)(2)(A). This notice addresses EPA's direct final action on the following four cutback asphalt rules:

*Submittal Date:* April 5, 1991

Placer County APCD—Rule 217,  
Cutback & Emulsified Asphalt Paving  
Material

*Adoption Date:* September 25, 1990

*Submittal Date:* May 30, 1991

Kern County APCD—Rule 410.5,  
Cutback, Slow Cure, & Emulsified  
Asphalt, Paving & Maintenance  
Operations

*Adoption Date:* May 6, 1991

San Diego County APCD—Rule 67.7,  
Cutback & Emulsified Asphalts

*Adoption Date:* May 21, 1991

*Submittal Date:* January 28, 1992

San Joaquin Valley Unified APCD—Rule  
463.1, Cutback, Slow Cure, and  
Emulsified Asphalt Paving &  
Maintenance Operations

*Adoption Date:* September 19, 1991

The above listed rules submitted on April 5, 1991, May 30, 1991, and January 28, 1992 were found to be complete pursuant to EPA's completeness criteria set forth in 40 CFR part 51, appendix V\* on May 21, 1991, July 10, 1991, and April 3, 1992 respectively. These rules control the emissions of VOC to the atmosphere from the manufacture and application of cutback asphalt used for construction and maintenance of parking lots, driveways, streets, and highways.

VOCs contribute to the production of ground level ozone and smog. These rules were originally adopted as part of the APCDs' efforts to achieve the National Ambient Air Quality Standard (NAAQS) for ozone and have been revised to achieve further emissions reductions in response to the SIP-Call and the section 182(a)(2)(A) CAA requirements. The following is EPA's evaluation and final action for the subject rules:

#### EPA Evaluation

In determining the approvability of a VOC rule, EPA must evaluate the rule for consistency with the requirements of the CAA and EPA regulations, as found in section 110 and part D of the CAA and in title 40 of the Code of Federal Regulations, part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). The EPA interpretation of these requirements,

which forms the basis for today's actions, appears in the various EPA policy guidance documents listed in footnote 3. Among those provisions is the requirement that a VOC rule must, at a minimum, provide for the implementation of reasonably available control technology (RACT) for major stationary sources of VOC emissions. This requirement was carried forth from the 1977 Act.

For the purpose of assisting states and locals in developing RACT rules, EPA prepared a series of Control Technique Guideline (CTG) documents. The CTGs are based on the underlying requirements of the Act and specify the presumptive norms for what is RACT for specific source categories. Under the CAA, Congress ratified EPA's use of these documents, as well as other Agency policy, for requiring States to "fix-up" their RACT rules. See section 182(a)(2)(A).

The CTG applicable to the cutback asphalt rules being acted on today is entitled, "Control of Volatile Organic Compounds from Use of Cutback Asphalt", EPA document No. EPA-450/2-77-037, December 1977. Further interpretations of EPA policy requirements are also found in the Blue Book. In general, these guidance documents have been set forth to ensure that VOC rules are fully enforceable and strengthen or maintain the SIP.

EPA has evaluated the submitted rules for consistency with the CAA, EPA regulations, and EPA policy and has found that the revisions address and correct all of the deficiencies previously identified by EPA. Furthermore, all of the rules will achieve greater enforceability through the inclusion of test methods and recordkeeping requirements.

A brief description of each rule change is provided below. The following rules have been evaluated against the existing federally enforceable SIP as well as current EPA policy.

Kern County APCD Rule 410.5 has been amended by adding definitions which clarify the meaning of certain terms used in the rule. Test methods have been added which aid in the enforcement of the rule. Recordkeeping requirements have also been added which require that manufacturers and users of cutback asphalt keep records on the amounts and types of asphalt used. Recordkeeping requirements assist in the enforcement of the rule. Past compliance dates have been removed and a previously uncontrolled source is now controlled.

Placer County APCD Rule 217 has been amended by adding definitions for new terms used in the rule and deleting

old definitions for terms that are no longer used in the rule. Test methods have been added. Past compliance dates and one exemption have been deleted. Recordkeeping requirements have also been added which require that manufacturers and users of cutback asphalt keep records on the amounts and types produced and used. In addition to these recordkeeping requirements, this rule states that the requirements of Rule 410, Recordkeeping for Volatile Organic Compound Emissions, must also be met. Rule 410 is being acted on in a separate Federal Register notice.

San Diego County APCD Rule 67.7 has been revised by adding new definitions to add clarity to the rule. New requirements have been added for those sources that ship the cutback asphalt to be used in locations outside of the County. Recordkeeping requirements for sellers, users, and applicators of cutback asphalt have been added. Test methods have been added which increase the enforceability of the rule.

San Joaquin Valley Unified APCD Rule 463.1 is a new rule which encompasses the requirements of the previous eight separate rules in effect in the eight air pollution control districts. This new rule is more stringent than the previous rules in that it contains recordkeeping requirements for manufacturers and users. Additional test methods have been added to measure the VOC content of the cutback asphalt. New definitions have been included in the rule which give it greater clarity.

#### EPA Action

EPA has evaluated the submitted rules listed above and has determined that they are consistent with the CAA, EPA regulations, and EPA policy. Therefore, EPA is approving the submitted rules under section 110(k)(3) of the CAA as meeting the requirements of section 110(a) and part D of the CAA.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

EPA is publishing this notice without prior proposal because the Agency views that as a noncontroversial amendment action and anticipates no adverse comments. This action will be effective August 24, 1992, unless, within

\* EPA has since amended the completeness criteria pursuant to section 110(k)(1)(A) of the amended Act. See 56 FR 42216 (August 26, 1991).



30 days of its publication, notice is received that adverse or critical comments will be submitted.

If such notice is received, this notice will be withdrawn before the effective date by publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective August 24, 1992.

#### Regulatory Process

Under 5 U.S.C. section 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (see 46 FR 8709.)

This action has been classified as a table 3 action by the Regional Administrator under the procedures published in the *Federal Register* on January 19, 1989 (54 FR 2214-2225). On January 6, 1989, the Office of Management and Budget waived table 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for a period of two years. EPA has submitted a request for a permanent waiver for table 2 and table 3 SIP revisions. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 24, 1992. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Hydrocarbons, Reporting and recordkeeping requirements.

Dated: June 3, 1992.

David P. Howekamp,

Acting Regional Administrator.

Title 40 of the Code of Federal Regulations, part 52, subpart F, is amended as follows:

#### PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

#### Subpart F—California

2. Section 52.220 is amended by adding paragraphs (c)(183)(i)(C), (c)(185)(i)(A)(2), (c)(185)(i)(B)(2), and (c)(187) to read as follows:

##### § 52.220 Identification of plan.

(c) \* \* \*  
(183) \* \* \*  
(i) \* \* \*  
(C) Placer County Air Pollution Control District.

(1) Amended Rule 217, adopted on September 25, 1990.

(185) \* \* \*  
(i) \* \* \*  
(A) \* \* \*  
(2) Rule 410.5, adopted on May 6, 1991.  
(B) \* \* \*  
(2) Rule 67.7, adopted on May 21, 1991.

(187) New and amended regulations for the following APCDs were submitted on January 28, 1992, by the Governor's designee.

(i) *Incorporation by reference.*  
(A) San Joaquin Valley Unified Air Pollution Control District.  
(1) Rule 463.1, adopted on September 19, 1991.

[FR Doc. 92-14681 Filed 6-23-92; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 52

[CO10-1-5483; FRL-4126-7]

#### Approval and Promulgation of State Implementation Plans; Colorado; Regulation No. 1

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** This rule approves a revision to the Colorado State Implementation Plan (SIP), which was submitted by the Governor of Colorado on November 17, 1988. The revision was made to Colorado Regulation No. 1 to exempt the static firing of Pershing missiles from opacity limitations. The destruction of the Pershing missiles was required by the Intermediate-Range Nuclear Forces (INF) Treaty between the United States and the Soviet Union. Revisions to the Common Provisions Regulation, Regulations No. 3, No. 11, and No. 13 were also submitted on November 17, 1988. These revisions are addressed in other *Federal Register* rules.

EPA originally published a direct final approval of this revision on May 11, 1989. However, EPA received notice that adverse comments would be submitted pursuant to the rulemaking, and therefore withdrew the direct final action on July 11, 1989. On October 23, 1990, EPA published a notice of proposed rulemaking to approve the revisions to Regulation No. 1. No comments were received pursuant to the proposed approval. EPA is therefore proceeding with its final approval of the revision of Colorado Regulation No. 1.

**EFFECTIVE DATE:** This approval will be effective on July 24, 1992.

**ADDRESSES:** Copies of the State submittal are available for public inspection between 8 a.m. and 4 p.m., Monday through Friday, at the following offices:

Environmental Protection Agency,  
Region VIII, Air Programs Branch, 999  
18th Street—Suite 500, Denver,  
Colorado 80202-2405.

Environmental Protection Agency,  
Public Information Reference Unit,  
Waterside Mall, 401 M Street,  
Washington, DC 20460.

Colorado Department of Health, Air  
Pollution Control Division, Plarmigan  
Place, North Cherry Creek Drive &  
Colorado Blvd., Denver, Colorado  
80209.

**FOR FURTHER INFORMATION CONTACT:**  
Vicki Stamper, Air Programs Branch,  
Environmental Protection Agency,  
Region VIII, 999 18th Street—Suite 500,  
Denver, Colorado 80202-2405, (303) 293-  
1765, (FTS) 330-1765.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On December 8, 1987, the United States and the Soviet Union signed the INF Treaty to eliminate intermediate-range and shorter-range Pershing missile systems. The INF Treaty provided for specific methods, procedures, and timeframes for destroying the missiles.

The Department of the Army completed an Environmental Assessment (EA) in February, 1988, pursuant to the provisions of The National Environmental Policy Act (NEPA), on the potential environmental effects of eliminating the Pershing missiles. The EA was submitted to the United States Senate for review during the treaty ratification process. The EA discussed the destruction methods of static firing and open burning at four potential sites in the states of Texas, Colorado, and Utah. The EA concluded with a finding of "no significant impact," but also identified the need for the issuance of environmental permits for



the destruction of the Pershing missiles. The Army applied for permits in each of the identified states. The Pueblo Army Depot Activity was the Colorado site evaluated in the EA for the elimination of the Pershing missiles.

To ensure compliance with the mandates of the INF treaty, and the Federal and State environmental regulations, the Army consulted with the Office of the Governor, the Colorado Department of Health, and the EPA. During meetings of April 6-7, 1988 with the Colorado Department of Health, the Army was advised to submit a rulemaking petition to exempt the static firing of Pershing missiles from the State opacity limit in Regulation No. 1. The Army was instructed to use the following reasoning when submitting this rulemaking petition: "Air emissions from the static firing of Pershing rocket motors are emitted directly into the ambient air and therefore cannot be mitigated."

In an April 15, 1988 letter, and before the Colorado Air Quality Control Commission (AQCC) on April 21, 1988, the Department of the Army petitioned for an amendment to Regulation No. 1, Section II.A., "Smoke and Opacity." The Army petitioned for the addition of a new section of Regulation No. 1, Section II.A.9., which would exempt emissions from the static firing of Pershing missiles at Pueblo Army Depot Activity for a period not to exceed 36 months from the first day of missile destruction, unless otherwise mandated by amendments to the INF treaty or the State emission permit.

On May 31, 1988, a test firing of a Pershing missile was completed. A State opacity inspector determined the opacity to be 100%, obviously greater than the 20% opacity standard in Regulation No. 1. Thus, in order for the Pershing missiles to be destroyed, an exemption from Regulation No. 1 was required. In addition, a permit was required to be issued under Colorado Regulation No. 3 prior to commencement of the firing of the Pershing missiles.

## II. Public Hearing and Adoption of Exemption

On July 21, 1988 and September 15, 1988, the Colorado AQCC held public hearings on the adoption of the exemption from the opacity standard in Regulation No. 1. Several parties commented that the Department of the Army did not fully evaluate all of the disposal options available for destruction of the Pershing missiles and, subsequently, did not arrive at the least environmentally damaging method. The Army replied that the missile destruction methods were clearly

specified in the INF treaty, and that any other methods of destruction would have to be negotiated with the Soviet Union. The Army did, however, commit to evaluating alternative methods of destruction for future reductions of Pershing missiles.

Several parties were also concerned with the health effects associated with the pollutants emitted from the static firing of the Pershing missiles. In order to protect against adverse health effects, the Colorado Air Pollution Control Division required the Army to conduct air monitoring for all potentially dangerous pollutants and prohibited any air pollutant from being emitted in dangerous quantities. These requirements were included both in the Regulation No. 1 exemption and in the emission permit issued to the Pueblo Army Depot Activity.

On September 15, 1988, the Colorado AQCC adopted the revision to Regulation No. 1 to exempt the static firing of Pershing missiles from the opacity limitations.

On November 3, 1988, the State issued an emission permit to the Pueblo Army Depot Activity for the static firing of the Pershing missiles. The permit contained the following requirements: (1) the emissions of any air pollutant regulated under the Federal Clean Air Act were not allowed to exceed 250 tons per year; (2) the firing of the missiles was allowed only under specific meteorological conditions; (3) the Army was to conduct an air monitoring program consistent with conditions specified in the permit; and (4) the Army was required to contact the State if any of the monitored values exceeded the pollutant threshold limits specified in the permit. EPA was involved in the review and approval of the permit, and concluded that the conditions in the permit provided for adequate protection against violations of the National Ambient Air Quality Standards (NAAQS) and against adverse health effects.

## III. State Submittal

On November 17, 1988, the State submitted the revision to Regulation No. 1 to EPA for approval in the SIP. The State adopted Section II.A.9. in Regulation No. 1 in order to exempt the static firing of intermediate-range and shorter-range Pershing missiles from the opacity standard contained in Regulation No. 1, as long as such static firing would not result in emissions in excess of 250 tons per year, adequate monitoring was conducted, and air pollutants were not emitted in dangerous quantities.

The opacity standard found in Regulation No. 1 was primarily designed

to ensure that standard smokestack-type sources of air pollution are properly and effectively controlled. However, in the case of the static firing of Pershing missiles, no pollution control equipment could be applied to the source of emissions. The State was not relying on the application of emission control systems to ensure protection of the NAAQS and public health and welfare. Instead, the State was relying on Federally enforceable permit conditions to ensure that air pollutants were not emitted in dangerous quantities and that the NAAQS were protected.

After review of the SIP submittal, EPA determined that the State acted appropriately and proceeded with approval of the SIP revision. Believing that it was a non-controversial amendment and that no adverse comments would be submitted, EPA published its approval in a direct final rule on May 11, 1989 (54 FR 20389). However, prior to the effective date of the rulemaking, EPA received notice from four parties that adverse comments would be submitted. EPA subsequently withdrew the final rule on July 11, 1989 (54 FR 29310) and published a proposal to approve the regulation revision on October 23, 1990 (55 FR 42731). No comments were received pursuant to this proposed approval. Therefore, EPA is proceeding with its final approval of the revision to Regulation No. 1.

## Final Action

EPA is approving the revision to Colorado Regulation No. 1, which exempts the destruction of missiles under the INF treaty from meeting the opacity standard of Regulation No. 1. While opacity requirements are generally appropriate for determining compliance for both stack and fugitive emissions, the State is not, in this case, relying on the application of emission control systems for which opacity is an indicator of proper operation. Instead, the State is relying on Federally enforceable permit conditions to ensure that air pollutants are not emitted in dangerous quantities and to ensure protection against NAAQS violations. Therefore, the opacity standard in Regulation No. 1 is not necessary for the enforcement of the permit issued to the Pueblo Army Depot Activity for the static firing of Pershing missiles.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental



factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the *Federal Register* on January 19, 1989 (54 FR 2214-2225). On January 8, 1989, the Office of Management and Budget (OMB) waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of Section 3 of Executive Order 12291 for a period of two years. EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this section must be filed in the United States Court of Appeals for the appropriate circuit by August 24, 1992. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. [See section 307(b)(2).]

The Agency has reviewed this request for revision of the federally-approved State Implementation Plan for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

#### List of Subjects in 40 CFR Part 52

Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: April 17, 1992.

Jack W. McGraw,  
Acting Regional Administrator.

40 CFR part 52, subpart G is amended as follows:

#### PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

#### Subpart G—Colorado

2. Section 52.320 is amended by adding paragraph (c)(58) to read as follows:

#### § 52.320 Identification of plan.

\* \* \*

(c) \* \* \*

(58) On November 17, 1988, the Governor submitted an amendment to Colorado Regulation No. 1, Section II.A.9., to exempt the destruction of Pershing missiles under the Intermediate-Range Nuclear Forces (INF) Treaty from meeting the opacity limits.

(i) *Incorporation by reference.*

(A) Regulation No. 1, Section II.A.9., adopted September 15, 1988, effective October 30, 1988.

[FR Doc. 92-14682 Filed 6-23-92; 8:45 am]

BILLING CODE 6580-50-M

#### 40 CFR Part 52

[MD 7-1-5278; FRL-4145-2]

#### Approval and Promulgation of Air Quality Implementation Plans; Maryland State Implementation Plan; Definitions of True Vapor Pressure and Vapor Pressure

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Maryland. This revision amends the Code of Maryland Regulations, 10.18.01.01, V-1 and X-1, the definitions of true vapor pressure and vapor pressure (now recodified as COMAR 26.11.01.01 Z. and CC.), making them enforceable and consistent with EPA's definitions. This action is being taken in accordance with section 110 of the Clean Air Act as amended by the Clean Air Act Amendments of 1990.

**EFFECTIVE DATE:** This action will become effective August 24, 1992, unless notice is received within 30 days that adverse or critical comments will be submitted. If the effective date is delayed, timely notice will be published in the *Federal Register*.

**ADDRESSES:** Comments may be mailed to Thomas J. Maslany, Director, Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building,

Philadelphia, PA 19107; and the Maryland Department of the Environment, 2500 Broening Highway, Baltimore, Maryland, 21224.

**FOR FURTHER INFORMATION CONTACT:** Mark Malenfant, (215) 597-8239.

**SUPPLEMENTARY INFORMATION:** On June 30, 1987, the State of Maryland submitted a formal revision to its State Implementation Plan (SIP). The SIP revision consists of amending two definitions under COMAR 10.18.01.01 (now COMAR 26.11.01.01): V-1. (now Z.) "True vapor pressure" and X-1. (now CC.) "Vapor pressure." These definitions were submitted as part of a larger submittal of SIP revision requests. On August 4, 1987 and on April 9, 1990, Maryland withdrew all other portions of the June 30, 1987 submittal except for those pertaining to automotive and light-duty truck surface coating regulations (COMAR 10.18.21.13) and the definitions of true vapor pressure and vapor pressure. The automotive and light-duty truck surface coating regulations (COMAR 10.18.21.13) were the subject of another rulemaking action published on April 6, 1990 (55 FR 12823). Therefore, this notice will only address the approval of the definitions of true vapor pressure and vapor pressure.

#### Summary of the SIP Revisions

The definition of true vapor pressure in the Maryland SIP is being amended to read: "True vapor pressure (TVP) means the vapor pressure of a material at storage temperature, where storage temperature is the maximum monthly average temperature of the material or 77 ° F (25 ° C), whichever is the highest." The definition of vapor pressure in the Maryland SIP is being amended to read: "Vapor pressure means the total equilibrium partial pressure or pressures for any given chemical or mixture at a given temperature." These definitions are being amended to clarify the applicability of certain VOC regulations. Certain VOC regulations such as those pertaining to gasoline marketing and gasoline or VOC storage are applicable only to sources which involve compounds with vapor pressures or true vapor pressures above a certain value. These definitions clearly establish the threshold for such applicability determinations and thereby make the regulations more enforceable. Since these definitions are contained in this notice and there are no additional technical issues associated with these definitions, a technical support document was not prepared.



EPA is approving these SIP revisions without prior proposal because the Agency views these as noncontroversial amendments and anticipates no adverse comments. This action will be effective 60 days from the date of this **Federal Register** notice unless, within 30 days of its publication, notice is received that adverse or critical comments will be submitted. If such notice is received, this action will be withdrawn before the effective date by simultaneously publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective on (60 days from today).

**FINAL ACTION:** EPA is approving COMAR 26.11.01.01 Z. and CC., the definitions of true vapor pressure and vapor pressure, as part of the Maryland SIP. These definitions are consistent with the Clean Air Act and EPA guidance.

The Agency has reviewed this request for revision of the federally-approved state implementation plan for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

This action, pertaining to the approval of the definitions of true vapor pressure and vapor pressure for the Maryland SIP, has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225). EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. The Office of Management and Budget has agreed to continue the temporary waiver until such time as it rules on EPA's request.

Under section 307(b)(1) of the Clean

Air Act, 42 U.S.C. 7607(b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 24, 1992. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in civil or criminal proceedings to enforce its requirements. (See 42 U.S.C. 7607(b)(2).)

#### List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 22, 1992.

Edwin B. Erickson,

Regional Administrator, Region III.

For the reasons set out in the preamble, Chapter I, title 40 of the Code of Federal Regulations is amended as follows.

#### PART 52 [AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

#### Subpart V—Maryland

2. Section 52.1070 is amended by adding paragraph (c)(89) to read as follows:

##### § 52.1070 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(89) Revisions to the State Implementation Plan submitted by the Maryland Department of the Environment on June 30, 1987.

(i) *Incorporation by reference.*

(A) Letter from the Maryland Department of Environment dated June 30, 1987 submitting a revision to the Maryland State Implementation Plan pertaining to the definitions of true vapor pressure and vapor pressure.

(B) Maryland Register Volume 13, page 2048; COMAR 10.18.01.01 Definitions V-1. and X-1 (Now recodified as COMAR 26.11.01.01 Z. and CC.).

[FR Doc. 92-14683 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 52

[TX 4097; FRL 4137-8]

#### Approval and Promulgation of Implementation Plan State of Texas Prevention of Significant Deterioration

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rulemaking.

**SUMMARY:** This Final Rule approves a revision to the Texas State Implementation Plan (SIP) that includes amendments to the Texas Air Control Board (TACB) Regulation VI, General Rules, a Supplement, and commitment letters, all related to the Prevention of Significant Deterioration (PSD) program. This approval enables the State of Texas to issue and enforce PSD permits directly in most areas of the State without final issuance of those PSD permits by the EPA. The proposed approval notice was published in the **Federal Register** on December 22, 1989. The EPA has reviewed and considered the public comments it has received in taking final action to approve this SIP revision; responses to significant comments are presented in this notice.

The Texas PSD SIP revision does not apply to sources located or wanting to locate on Indian lands. Neither is it applicable to new major sources or major modifications to existing stationary sources for which applicability determinations would be affected by dockside emissions from vessels. This PSD SIP revision has been approved under the statutory requirements of Sections 110 and 160 through 169 of the Clean Air Act (the Act).

As a result of today's final action, the TACB will have direct authority on the effective date of this rule, to issue and enforce the PSD permits in most areas of Texas, with the limitations described in this rule. The PSD delegation agreement of April 23, 1981, additional authority dated December 28, 1982, and addendum dated August 21, 1988, shall remain in effect for major new sources and major modifications to existing sources for which applicability determinations would be affected by dockside emissions from vessels. Under this agreement, the TACB has administrative, technical review, and public participation authority for PSD permit applications associated with dockside vessel emissions, and the EPA has final permit approval and enforcement authority regarding such sources including oversight of PSD applicability determinations regarding such sources. All of the inquiries,



requests, and PSD applications related to emissions from docked vessels should be directed initially to the TACB at the address given in this notice. Further rationale for this final approval action is contained in the notice of proposed rulemaking and this final action, and is further explained in detail in the Technical Support Document.

**EFFECTIVE DATE:** This action become effective on July 24, 1992.

**ADDRESSES:** Copies of the State's submittal and EPA's Technical Support Document along with other relevant information are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least twenty-four hours before the visiting day.

Chief, Planning Section (6T-AP), Air Programs Branch, Air, Pesticides, and Toxics Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 655-7214, or, Texas Air Control Board, Planning and Development, 12124 Park 35 Circle, Austin, Texas 78753, Telephone: (512) 908-1000.

In addition, all requests, reports, applications, and any other communications relating to PSD permits for the affected facilities in Texas, in areas outside of Indian lands, should be sent directly to the Texas Air Control Board, 12124 Park 35 Circle, Austin, Texas 78753. Sources located on Federally-designated Indian lands in the State of Texas should submit the information specified above to the Chief, Region 6 Air Programs Branch, U.S. Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202-2733.

**FOR FURTHER INFORMATION CONTACT:** Mr. J. Behnam, P. E.; Air Programs Branch, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, telephone (214) 655-7214.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On November 10, 1980, the State of Texas requested delegation of the technical and administrative review and public participation portions of the Federal PSD program. Pursuant to 40 CFR 52.21(u), the PSD partial delegation of authority was granted on April 23, 1981, subject to certain conditions. On December 28, 1982, additional authority was granted to the State to conduct compliance inspections and to review compliance test reports for PSD sources. See 48 FR 6023 (February 9, 1983). Texas

has also been delegated partial authority for the Visibility Protection New Source Review (NSR) program under the Federal PSD program within 40 CFR 52.21(p), which was revised to incorporate the visibility protection SNR requirements of 40 CFR 51.307 on July 12, 1985. See 51 FR 40072 (November 4, 1986).

On December 11, 1985, October 26, 1987, February 18, 1988, and September 29, 1988, the Governor of Texas submitted PSD SIP revisions to EPA for approval. The October 26, 1987, submittal also included revisions to meet the requirements of the stack height regulation under the Act (40 CFR 51.100). The TACB stack height regulation, Regulation VI, Section 116.3(a)(14), has been reviewed and approved by the EPA and published under a separate action. See 53 FR 47189 (November 22, 1988).

The State's Regulation VI requires review and control of air pollution from new facility construction and modification and allows the TACB to issue permits for stationary sources subject to this regulation. Section 116.3(a)(13) of the TACB Regulation VI incorporates by reference the Federal PSD regulations (40 CFR 52.21) as they existed on August 1, 1987, which include revisions associated with the July 1, 1987, promulgation of revised National Ambient Air Quality Standards for particulate matter (52 FR 24872) and the visibility NSR requirements noted above. The State explicitly excluded several sections of the Federal PSD regulation not necessary for approval of the Texas program. The reasons for these exclusions were discussed in the proposed approval notice of December 22, 1989 (54 FR 52823). Other requirements necessary for an approvable PSD SIP revision, such as enforcement by Texas of EPA-issued PSD permits, were adopted by the TACB in its General Rules. Also, the public participation requirements of the Federal PSD regulations are met by the existing SIP-approved section 116.10 of Regulation VI and the PSD Supplement as adopted by the TACB on July 17, 1987.

In developing its PSD SIP, the TACB conducted a complete public participation program pursuant to 40 CFR 51.102, and the final revisions were adopted by the Board on July 26, 1985, July 17, 1987, December 18, 1987, and July 15, 1988. In today's final action, it should be noted that EPA is not taking action on the following amendments: (1) Amendments to Sections 116.1, 116.2, and 116.10 of Regulation VI as adopted on July 26, 1985 by the TACB and submitted by the Governor on December

11, 1985; (2) amendments to section 116.10 of Regulation VI as adopted on July 17, 1987 by the TACB and submitted by the Governor on October 26, 1987; (3) amendments to sections 116.5 and 116.10 as adopted by the TACB on December 18, 1987 and submitted by the Governor on February 18, 1988; and (4) amendments to Sections 116.1 and 116.10 as adopted by the TACB on July 15, 1988 and submitted by the Governor on September 29, 1988. EPA will be taking separate action on the above amendments and other pending SIP revisions to Regulation VI at a later date.

The EPA has reviewed and evaluated the PSD SIP submittals based on the criteria specified in the Federal regulations at 40 CFR 52.21, 40 CFR 51.166, and the Act. The EPA's review also included other relevant SIP-approved TACB regulations and the Texas Clean Air Act. A discussion of this evaluation, as of that date, is included in EPA's proposed approval notice of December 22, 1989 (54 FR 52823). This evaluation has continued through the public notice and comment process.

#### **Public Comments**

The EPA received comments from the Texas Utility Service, Texas Chemical Council, American Paper Institute, National Forest Products Association, MacMillan Bloedel, Inc., Champion International Corporation, Utility Air Regulatory Group, International Paper and the law firm of Brown, Maroney and Oaks Hartline, on behalf of a variety of Texas industrial and manufacturing companies. All of the commenters supported EPA's final approval of the Texas PSD SIP. The commenters objected, however, to certain language in the preamble of the proposed notice. A summary of the significant public comments and EPA's response is narrated below.

**Comment 1:** The commenters expressed concern with the preamble language in the proposal notice, suggesting that final approval would require that the State follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations as well as EPA's operating policies and guidance. The commenter contended that such a condition would be unlawful, unnecessary, unreasonable, legally untenable, and would improperly limit the State's flexibility. These commenters argued that the State has primary responsibility for implementation once the SIP is approved and thus the State should be making decisions, not EPA. Also, if EPA



wants to condition the PSD SIP approval on commitments to comply with any interpretations, policies, and guidance issued by EPA, EPA must reduce those interpretations, policies and guidance to rules, thereby giving the public opportunity to review and comment before EPA's final decision. If TACB fails to adopt any of these, once reduced to a rule, EPA can issue a SIP call pursuant to section 110(a)(2)(H).

*Response 1:* The EPA did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act. As clarified herein, EPA's intent is merely to place the State and the public on notice of EPA's longstanding views that the Agency must continue to oversee the State's implementation of the PSD SIP. The language in question is neither a part nor a condition of EPA's approval of the Texas PSD SIP, and it has no binding effect. Rather than creating new rights or obligations, it advises the public of EPA's role in overseeing the obligations that already exist by operation of the applicable statutory and regulatory provisions.

The issuance of PSD permits and other actions by the State in the administration of the PSD program must conform to the requirements of the Act, applicable EPA regulations, and the SIP. See sections 167 and 113, 42 U.S.C. 7477 and 7413 (EPA's enforcement authority in overseeing State implementation). In making judgments as to what constitutes compliance with the Act and regulations issued thereunder, EPA looks to (among other sources) its policy statements and interpretive rulings in effect at the time of EPA's action regarding those statutory and regulatory requirements. EPA's approval of a state PSD program or some portion of it does not divest the Agency of its duty to continue a vigorous oversight and enforcement role under sections 167 and 113. For example, section 167 provides that EPA shall take whatever enforcement action may be necessary to prevent construction of a major stationary source that does not conform to the requirements of the PSD program. Thus, the purpose of the preamble language in the proposal notice was to advise Texas and the public of EPA's view that approval of a state's PSD program does not bar EPA from deciding whether the state's action in implementing its SIP conforms to the Act's PSD requirements.

Following SIP approval, then, EPA remains as the congressionally designated agency with primary responsibility to reasonably interpret the applicable Federal law under the Act, and to base its enforcement actions on those interpretations. If EPA determines that a state-issued permit does not conform to the Act's PSD requirements, EPA will decide whether to sue the state and/or the source for declaratory and injunctive relief. See, e.g., section 113(a)(5); 55 FR 23547 (notice of clarification regarding approval of Kentucky PSD SIP).

EPA acknowledges that states have the primary role in administering and enforcing the various components of the PSD program. States have been largely successful in this effort, and EPA's involvement in interpretative and enforcement issues is limited to only a small number of cases. Consequently, EPA's continuing oversight role under the Act leaves Texas and other states with considerable discretion to implement the PSD program as they see fit.

As noted in the proposed approval of Texas' program, EPA may not fundamentally change the requirements set forth in its own regulations or approved SIPs in the guise of new interpretations or policy statements. The creation of new rights or obligations can only be effected through enactment of legislation or promulgation of regulations or approval of SIP revisions, which usually must be preceded by revisions to the regulations in 40 CFR parts 51 and 52, in accordance with applicable rulemaking procedures. Second, EPA's interpretations often are intended in whole or in part to guide only EPA regional offices, and in such instances they have no implications whatsoever for a state's administration of its program. PSD-SIP approved states remain free to follow their own course, provided that state action is consistent with the letter and spirit of the SIP, when read in conjunction with the applicable statutory and regulatory provisions.

*Comment 2:* Another major concern was whether EPA may use section 167 of the Act to challenge State-issued PSD permits. The commenters contended that EPA already has authority under the Act to review permit applications, file written comments, present oral testimony, challenge the State's decision in the State court, take enforcement powers in the State under section 113(a)(2), or issue a SIP revision call under section 110(a)(2)(H) of the Act. The commenters stated that the EPA does not have the authority under

sections 167 and 113 of the Act to sue a permittee for violating the Act.

*Response 2:* The EPA intends to continue its close working relationship with the State and, through informal consultation and formal comments on draft permits, to resolve any issues regarding the adequacy of PSD permits. However, as discussed above, approval of the Texas PSD program does not divest EPA of its enforcement authority. If a final permit is issued that in EPA's view still does not reflect consideration of the relevant factors, EPA may view the permit as inadequate and may consider enforcement action under sections 113 and 167 against the State and/or company to address the permit deficiency. However, in defending against such an enforcement action, a party is free to assert that EPA has not reasonably interpreted the underlying statutory and regulatory provisions.

*Comment 3:* Another allegation is that EPA has improperly included certain provisions in the Texas PSD SIP mandating implementation of the "Top-Down" methodology for determining BACT for PSD permits. The commenters contend that the "Top-Down" approach is inconsistent with the requirements of the Act and that EPA can not legally require that Texas follow this approach. Most commenters also stated that EPA has exceeded its statutory authority in implementing the "Top-Down" BACT approach, and they believed that this policy and guidance should be subject to appropriate rulemaking, public review and comment.

*Response 3:* It is not necessary to resolve the legal issues relating to the top-down approach to BACT. As discussed below in response to Comment 4, EPA agrees that the TACB letter of September 5, 1989, does not mandate the State follow a top-down approach to BACT. In addition, the commenters procedural concerns are being addressed. In 1989, industry groups petitioned EPA to conduct rulemaking to rescind the top-down policy and initiate a rulemaking on BACT determinations based on similar concerns. The EPA denied this request, explaining that the top-down approach was not at variance with, nor a revision of, the PSD regulations, and that no rulemaking was required. Litigation was commenced, resulting in a judicial settlement agreement. See 56 FR 34202 (announcing proposed settlement). In so doing, EPA has agreed to issue a proposed rule to revise or clarify the regulations defining BACT, see 40 CFR 51.166(i) and 52.21(i), and to clarify EPA policy regarding BACT determinations. EPA has decided as a matter of policy to



conduct this rulemaking in order to facilitate greater public participation concerning the issue. The proposed rule is currently being developed.

**Comment 4:** One commenter noted that the TACB's letter, dated September 5, 1989, can not reasonably be interpreted as a legal requirement that the State follow the EPA's present and future new source review interpretations, policies and guidance, including the BACT "Top-Down" approach, because it only commits Texas to implement properly-established EPA requirements and legally-binding EPA decisions. The commenter said that the Clean Air Act specifically requires that, if at all, any such change in EPA policy for BACT determinations be accomplished through notice and comment rulemaking, and that the EPA first prepare an economic impact assessment.

**Response 4:** In certain circumstances, EPA's approval of a SIP revision through notice-and-comment rulemaking procedures can serve to adopt specific interpretations or decisions of the Agency. For example, a state may commit in writing to follow particular EPA interpretations or decisions in administering the PSD program. As part of the SIP revision process, EPA may incorporate that State's commitment into the SIP by reference. This process has been followed in today's action. Of course, EPA agrees with the commenter that the Agency must act reasonably in construing the terms of a commitment letter, so as to avoid approving it in a manner that would contravene the state's intent in issuing the letter in the first place. Moreover, the State commitment must be consistent with the plain language of the applicable statutory or regulatory provisions at issue. Similarly, EPA cannot unilaterally change the clear meaning of any approved SIP provision by later guidance or policy. Rather, as stated in the proposed approval notice, such fundamental change must be accomplished through the SIP revision process.

Consistent with the terms of the TACB letter dated September 5, 1989, EPA views that letter as a commitment on the part of the TACB to "implement EPA program requirements \* \* \* as effectively as possible," and as a commitment "to the implementation of the EPA decisions regarding PSD program requirements." EPA agrees, however, that the TACB letter need not be interpreted as a specific commitment by the State to follow a "Top-Down" approach to BACT determinations.

**Comment 5:** Two commenters indicated that if EPA plans to revise 40

CFR 52.2303 for anything other than approval of the Texas PSD SIP program, then EPA should have provided the public with that additional language in the proposal.

**Response 5:** The EPA's revision today of 52 CFR 52.2303 makes only the pertinent State's submittals part of the SIP. Nothing outside of those State submittals is made part of the Texas PSD SIP.

**Comment 6:** Two commenters stated that the proposed approval notice did not indicate a transition policy for pending permits.

**Response 6:** The EPA Region 6 Office will transfer, on the effective date of this final action, all of the pending PSD permit applications to the State of Texas for review and issuance of final PSD permits. The EPA has no authority to issue PSD permits in the State of Texas upon the effective date of this rulemaking unless Indian lands or docked vessel emissions are involved. All of the PSD permits (other than those for Indian lands and for sources with docked vessel emissions) that will be issued on or after the effective date of this final action must be issued by the TACB, not EPA.

#### Final Action

EPA is today taking final action to approve the following as part of the Texas PSD SIP: (1) TACB Regulation VI, § 116.3(a)(13) as adopted by the TACB on July 26, 1985 and as revised by the TACB on July 17, 1987 and July 15, 1988 and submitted by the Governor on December 11, 1985, October 26, 1987, and September 29, 1988, respectively; (2) the PSD Supplement as adopted by the TACB on July 17, 1987 and submitted by the Governor on October 26, 1987; (3) TACB General Rule, Section 101.20(3) as adopted by the TACB on July 26, 1985 and submitted by the Governor on December 11, 1985; and (4) the TACB commitment letters submitted by the Executive Director on September 5, 1989 and April 17, 1992. In addition, the existing SIP-approved Regulation VI and the Texas Clean Air Act are part of the Texas PSD SIP that is being approved today in this final rule.

This final approval is based on review and evaluation of the Governor's submissions of December 11, 1985, October 26, 1987, February 18, 1988, and September 29, 1988, the existing SIP-approved TACB regulations and Texas Clean Air Act, the TACB's September 5, 1989 letter, and the July 17, 1987 Texas PSD SIP Supplement. Thus, as of the effective date of this rule, the public and PSD applicants should be aware that the TACB will have direct authority, except as limited below, to issue and enforce

the PSD permits in most areas of Texas. All PSD requests, reports, applications, and such other communications for affected facilities in Texas, in areas outside of Indian lands, should be sent directly to the Texas Air Control Board, 12124 Park 35 Circle, Austin, Texas 78753. Sources located on the Federally designated Indian lands in the State of Texas should submit the information specified above to the Chief, Region 6 Air Programs Branch, U.S. Environmental Protection Agency, 1445 Ross Avenue, Dallas, Texas 75202. The PSD delegation agreement of April 23, 1981, additional authority dated December 28, 1982, and addendum dated August 21, 1988, shall remain in effect for major new sources and major modifications to existing sources for which applicability determinations would be affected by dockside emissions from vessels. Under this agreement, the TACB has administrative, technical review, and public participation authority for the PSD permit applications associated with dockside vessel emissions, while EPA retains final permit approval and enforcement authority regarding such sources, as well as oversight of the State's final authority to determine PSD applicability. All of the inquiries, requests, and PSD applications (except the permit final approval and enforcement issues) related to emissions from docked vessels should be directed to the Texas Air Control Board at the address above.

Also, Texas' incorporation by reference of 40 CFR 52.21 includes § 52.21(p), part of which constitutes the Federal visibility NSR rules for major new sources and major modifications in attainment areas. Accordingly, EPA is also approving this SIP revision as meeting the requirements of 40 CFR 51.307 with respect to visibility NSR in attainment areas.

Today's final approval allows the TACB to issue PSD permits for a subclass of municipal incinerators (municipal waste combustors). Section 305 of the 1990 Clean Air Act Amendments, Public Law 101-549, amended section 169(1) of the Act by expanding the list of major emitting facilities that are subject to PSD requirements if they emit or have the potential to emit one hundred tons per year or more of any regulated pollutant. This list now includes municipal incinerators capable of charging more than fifty tons of refuse per day. Under prior law, only municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day were subject to the 100 tons-per-year



major source threshold for PSD applicability. EPA interprets this statutory change as being immediately effective.

In contrast to the treatment of lowered new source review applicability thresholds in certain other provisions of the 1990 Amendments, Congress did not grant states a period of time to develop SIP revisions to implement this change before making it effective. Compare, for example, new CAA sections 182(c), lowering major source thresholds for major sources in serious ozone nonattainment areas to fifty tons per year, and new section 182(a)(2)(C)(i), granting states two years from enactment to submit revised SIPs reflecting changes in new source review permitting requirements for nonattainment areas before the lowered thresholds become effective even absent a state submission, with section 165(a)(1), which flatly states that no "major emitting facility" may be constructed in a PSD area without a PSD permit.

The statutory change regarding the applicability threshold for municipal incinerators is simple and straightforward. It does not require any corresponding procedural or substantive change to the PSD permitting process in Texas or any other state. Accordingly, EPA believes it would be unnecessary and unreasonable to prohibit construction of the subclass of facilities in question pending a change in the threshold tonnage levels of applicable PSD regulations. However, because Texas's SIP consists largely of the incorporation by reference of the Federal PSD regulations at 40 CFR 52.21 as it existed on September 29, 1988, and since the definition of "major emitting facility" in those regulations at that time expressly did not include municipal incinerators charging fifty tons of refuse per day, the TACB by its letter of April 17, 1992 committed that TACB will review the municipal incinerators in accordance with the 1990 CAAA and will use the fifty-ton threshold for PSD applicability. This interpretation of the purpose and effect of the Texas plan is a part of today's SIP approval action. In contrast, EPA believes that in those states where it directly or by delegation implements the PSD program under § 52.21, it has authority to interpret its regulations in light of the statutory change to section 169(1) enabling the issuance of PSD permits to the sources in question rather than applying the prohibition on construction in section 165(a)(1). Because, as noted above, the statutory change in question is simple and straightforward, and because it

would serve no purpose to prohibit construction of the sources in question pending a further SIP revision, EPA believes that it has good cause within the meaning of 5 U.S.C. 553(B)(3)(B) to find that an opportunity to comment on this aspect of today's action would be unnecessary and contrary to the public interest.

The EPA has reviewed the submissions by Texas for conformance with the provisions of the 1990 CAAA, Public Law 101-549. The EPA has determined that certain statutory changes have immediate effect on the Texas PSD SIP being approved today, although none of them require additional changes to the terms of the SIP at this time. These statutory changes include the revised applicability threshold for certain municipal incinerators, discussed above in this notice. The other statutory changes that are being addressed in this notice are discussed below.

Section 193 of the 1990 CAAA revised sections 162(a) and 164(a) of the Clean Air Act to specify that the boundaries of areas designated as Class I must conform to all boundary changes at such parks and wilderness areas made since August 7, 1977 and any changes that may occur in the future. Prior law was unclear on this point. However, EPA interprets the current regulations at 40 CFR 52.21 as being able to accommodate these statutory changes, and no regulatory revisions are necessary at this time in order to implement these changes. For a discussion of EPA's policy regarding the implementation of the boundary change, please consult the memorandum entitled "New Source Review Program Transitional Guidance," from John S. Seitz, Director, Office of Air Quality Planning and Standards, March 11, 1991. In addition, the TACB letter of April 17, 1992 committed the TACB to interpret the PSD regulations in a manner consistent with the changes in sections 162(a) and 164(a) of the Act as interpreted by EPA.

Section 403 of the 1990 CAAA revised section 169(3) of the Act to specify that "clean fuels" should be considered in a BACT analysis, and to provide that a source utilizing clean fuels or any other means to comply with the BACT requirement shall not be allowed to increase above levels that would have been required under section 169(3) prior to the 1990 Amendments. EPA has interpreted the new statutory language regarding clean fuels as merely codifying present practice under the Act, under which clean fuels are an available means of reducing emissions to be considered along with other approaches

in identifying BACT-level controls. See the letter from William G. Rosenberg, Assistant Administrator, to Henry Waxman, Chairman, Subcommittee on Health and the Environment, U.S. House of Representatives, October 17, 1990. Accordingly, EPA believes that no regulatory revisions are necessary in order to implement these statutory changes. In addition, in its letter of April 17, 1992, the TACB has committed to interpreting the revised language in section 169(3) in a manner consistent with EPA's interpretation.

With respect to all of the statutory changes discussed in today's rule, EPA plans to undertake national rulemaking in the near future to adopt clarifying changes to its regulations. Upon final adoption of those regulations, EPA will call upon states with approved PSD programs, including Texas, to make corresponding changes in their SIPs.

The EPA has reviewed this request for revision of Texas' Federally-approved State Implementation Plan for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. As discussed above, the EPA has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 24, 1992. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

Under 5 U.S.C. 605(b), I certify that this final SIP approval will not have a significant economic impact on a substantial number of small entities (46 FR 8709).

This final rulemaking is issued under the authority of sections 110, 160-169, and 301 of the Clean Air Act, 42 U.S.C. 7410, 7470-7479, and 7601.

#### List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen-dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.



Dated: May 21, 1992.  
William K. Reilly,  
Administrator.

Title 40, part 52 of the Code of Federal Regulations is being amended as follows:

#### PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

#### Subpart SS—Texas

2. Section 52.2270 is amended by adding paragraph (c)(73) to read as follows:

##### § 52.2270 Identification of plan.

(c) \* \* \*

(73) Revisions for Prevention of Significant Deterioration (PSD) are: Regulation VI—Section 116.3(a)(13) as adopted by the Texas Air Control Board (TACB) on July 26, 1985 and as revised by the TACB on July 17, 1987 and July 15, 1988 and submitted by the Governor on December 11, 1985, October 26, 1987, and September 29, 1988, respectively; the PSD Supplement as adopted by the TACB on July 17, 1987 and submitted by the Governor on October 26, 1987; General Rules—Section 101.20(3) as adopted by the TACB on July 26, 1985 and submitted by the Governor on December 11, 1985; and the TACB commitment letters submitted by the Executive Director on September 5, 1989 and April 17, 1992. Approval of the PSD SIP is partially based on previously approved TACB regulations and State statutes.

##### (i) Incorporation by reference.

(A) Revisions to the TACB Regulation VI (31 TAC chapter 116)—Control of Air Pollution by Permits for New Construction or Modification: Rule 116.3(a)(13) as adopted by the TACB on July 26, 1985 and as revised by the TACB on July 17, 1987 and July 15, 1988.

(B) Revision to TACB General Rules (31 TAC Chapter 101)—Rule 101.20(3) as adopted by the TACB on July 26, 1985.

(C) TACB Board Order No. 85-07, as adopted on July 26, 1985.

(D) TACB Board Order No. 87-09, as adopted on July 17, 1987.

(E) TACB Board Order No. 88-08, as adopted on July 15, 1988.

(F) The following portions of the PSD Supplement, as adopted by the TACB on July 17, 1987: 1. (2) Initial Classification of areas in Texas, pages 1-2; 2. (3) Re-designation procedures, page 2; 3. (4) plan assessment, pages 2-3; 4. (6) Innovative Control Technology, page 3;

and 5. (7) Notification, (a) through (d), page 4.

##### (ii) Additional material.

(A) The PSD Supplement as adopted by the TACB on July 17, 1987.

((B) A letter dated September 5, 1989, from the Executive Director of the TACB to the Regional Administrator of EPA Region 6.

(C) A letter dated April 17, 1992, from the Executive Director of the TACB to the Division Director of Air, Pesticides and Toxics Division, EPA Region 6.

3. Section 52.2303 is revised to read as follows:

##### § 52.2303 Significant deterioration of air quality.

(a) The plan submitted by the Governor of Texas on December 11, 1985 (as adopted by the TACB on July 26, 1985), October 26, 1987 (as revised by the TACB on July 17, 1987), and September 29, 1988 (as revised by the TACB on July 15, 1988) containing Regulation VI—Control of Air Pollution for New Construction or Modification, § 116.3(a)(13); the Prevention of Significant Deterioration (PSD) Supplement document, submitted by the Governor on October 26, 1987 (as adopted by the TACB on July 17, 1987); and revision to General Rules, Rule 101.20(3), submitted by the Governor on December 11, 1985 (as adopted by the TACB on July 26, 1985), is approved as meeting the requirements of part C, Clean Air Act for preventing significant deterioration of air quality.

(b) The plan approval is partially based on commitment letters provided by the Executive Director of the Texas Air Control Board, dated September 5, 1989 and April 17, 1992.

(c) The requirements of section 160 through 165 of the Clean Air Act are not met for Federally-designated Indian lands. Therefore, the provisions of § 52.21 (b) through (w) are hereby adopted and made a part of the applicable implementation plan and are applicable to sources located on land under the control of Indian governing bodies.

(d) The requirements of section 160 through 165 of the Clean Air Act are not met for new major sources or major modifications to existing stationary sources for which applicability determinations would be affected by dockside emissions of vessels. Therefore, the provisions of § 52.21 (b) through (w) are hereby adopted and made a part of the applicable

implementation plan and are applicable to such sources.

[FR Doc. 92-14684 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-M

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Public Health Service

##### 42 CFR Part 100

RIN: 0905-AD25

##### Vaccine Injury Compensation; Calculation of Cost of Health Insurance

AGENCY: Public Health Service, HHS.

ACTION: Final rule.

**SUMMARY:** Subtitle 2 of title XXI of the Public Health Service Act (PHS), as enacted by the National Childhood Vaccine Injury Act of 1988, and as amended, governs the National Vaccine Injury Compensation (NVIC) Program. The NVIC Program, administered by the Secretary, provides that a proceeding for compensation for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition with the United States Claims Court. In some cases, the injured individual may receive compensation for future lost earnings, less appropriate taxes and the "average cost of a health insurance policy, as determined by the Secretary." This final rule sets out the amount to be deducted from the award of compensation which reflects the average cost of a health insurance policy.

**DATES:** This regulation is effective on July 23, 1992.

##### FOR FURTHER INFORMATION CONTACT:

Mr. Thomas E. Balbier, Jr., Director, Division of Vaccine Injury Compensation, 6001 Montrose Road, room 702, Rockville, Maryland 20852; telephone number: 301 443-6593.

**SUPPLEMENTARY INFORMATION:** On June 28, 1991, the Assistant Secretary for Health, with the approval of the Secretary of Health and Human Services, published in the *Federal Register* (56 FR 29608), a Notice of Proposed Rulemaking (NPRM) to establish regulations for the National Vaccine Injury Compensation Program (NVIC) to set out the method for determining the amount to be deducted from the award of compensation which would reflect the average cost of a health insurance policy. The public comment period on the proposed regulations closed on August 27, 1991.



The Department received one comment on this NPRM after the deadline. The comment received from this one respondent and the Department's response are discussed below.

Under the NVIC Program, an individual may file a petition in the United States Claims Court for compensation for vaccine-related injuries or death. The elements of compensation to be awarded to a successful petitioner are set out in section 2115 of the Public Health Service Act, 42 U.S.C. 300aa-15. The injured person in certain cases is eligible to receive compensation for loss of earnings, less appropriate taxes and the "average cost of a health insurance policy, as determined by the Secretary."

In the NPRM, the Department proposed two methods of determining the amount to be deducted from the award of compensation for the average cost of a health insurance policy. Both methods used the average monthly premium cost for individuals covered under employment-related group insurance from annual survey data from the Health Insurance Association of America (HIAA) as a basis for the calculation. The two alternatives differed only in the method used to adjust this base amount to reflect changes in the costs of medical care which underlie health insurance. The first alternative used only the medical care component of the Consumer Price Index (CPI) to adjust the base figure. The second alternative proposed adjusting the base figure by 2 percent per year in addition to the medical care component of the CPI. This additional adjustment is in recognition of the fact that the CPI does not account for such factors as increases in medical care associated with improved technology or changes in utilization of medical services.

Subsequent to publication of the NPRM, the HIAA published the results of its most recent survey. The estimated average cost of a health insurance policy, resulting from the second of the two methods, was closer to the figure from the latest HIAA survey. As a result, the Secretary has opted to use the second method in determining the average cost of health insurance.

The results of the 1990 survey were published in the journal of *Health Affairs*, Vol. 10, No. 2, Summer 1991. The survey results show that the average cost of an individual health insurance policy in 1990, weighted by the market share of various health insurance arrangements, was \$141.00 per month.

When this baseline figure is indexed by the medical care component of the Consumer Price Index (CPI) index

covering the period July 1, 1990 until September 30, 1991 (10.1) plus an additional 2 percent per year as described above, the estimate for 1990 is \$158.00 per month. After promulgation of this regulation, the Department will file updated figures with the United States Claims Court and will list the new figure by publishing a notice in the *Federal Register* from time to time as determined by the Secretary. If, over time, the average cost of health insurance, as calculated by the method described above, significantly differs from subsequent HIAA survey results or other authoritative sources then available, the Secretary will consider appropriate revisions to this rule.

The comments received from the one respondent did not include a statement of preference for either of the two options presented in the NPRM. The respondent did suggest, however, that the cost of health insurance would be better expressed as a percentage of salary rather than as a dollar figure. While this may be a reasonable approach, the legislation is clear that the "the average cost of a health insurance policy" is to be deducted from the lost earnings, which themselves are determined under a statutory directive. Thus, the Department cannot accept this suggestion. Further, the respondent was concerned that the compensation related to lost wages did not account for fringe benefits in its estimation of average salaries. While this regulation addresses only the calculation of the deduction for the average cost of health insurance, the legislation is clear and specific in that compensation for lost wages is based on "the average gross weekly earnings of workers in the private, non-farm sector." The only adjustments to this amount (which is found in data from the *Employment and Earnings* survey done by the Department of Labor, Bureau of Labor Statistics) are for "appropriate taxes" and the health insurance policy cost. Further adjustments are not authorized.

#### Regulatory Flexibility Act and Executive Order 12291

The Secretary certifies that this regulation does not have a significant economic impact on a substantial number of small entities, and therefore does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

The Department has also determined that this final rule does not meet the criteria for a major rule as defined by section (b) of Executive Order 12291. In addition, costs will not exceed the threshold criteria of \$100 million for

major rules, therefore a regulatory impact analysis is not required.

#### Paperwork Reduction Act of 1980

This regulation has no information collection requirements.

#### List of Subjects in 42 CFR Part 100

Biologics, Compensation, Health insurance, Immunizations.

Dated: March 9, 1992.

James O. Mason,

Assistant Secretary for Health.

Approved: April 21, 1992.

Louis W. Sullivan,

Secretary.

Accordingly, 42 CFR chapter I is amended by adding a new subchapter J consisting of part 100, as set forth below.

#### Subchapter J—Vaccine Injury Compensation

#### PART 100—VACCINE INJURY COMPENSATION

Sec.

100.1 Applicability.

100.2 Average cost of a health insurance policy.

Authority: 42 U.S.C. 216, 300 aa-15.

##### § 100.1 Applicability.

This regulation applies to the National Vaccine Injury Compensation (NVIC) Program under subtitle 2 of title XXI of the Public Health Service (PHS) Act.

##### § 100.2 Average cost of a health insurance policy.

For purposes of determining the amount of compensation under the NVIC Program, section 2115(a)(3)(B) of the PHS Act, 42 U.S.C. 300aa.15(a)(3)(B), provides that certain individuals are entitled to receive an amount reflecting lost earnings, less certain deductions. One of the deductions is the average cost of a health insurance policy, as determined by the Secretary of Health and Human Services. The Secretary has determined that the average cost of a health insurance policy is \$158.00 per month. This amount will be revised to reflect the changes in the medical care component of the Consumer Price Index (All Urban Consumers, U.S. City Average), published by the United States Bureau of Labor Statistics, plus 2 percent per year. The revised amounts will be effective upon their delivery by the Secretary to the United States Claims Court, and the amounts will be published in a notice in the *Federal Register* from time to time as determined by the Secretary.

[FR Doc. 92-14663 Filed 6-23-92; 8:45 am]

BILLING CODE 4160-15-M



**Health Care Financing Administration****42 CFR Part 431**

(MB-30-F)

RIN 0938-AF09

**Medicaid Program; Coordination of Medicaid With Special Supplemental Food Program for Women, Infants, and Children (WIC)****AGENCY:** Health Care Financing Administration (HCFA), HHS.**ACTION:** Final regulations.

**SUMMARY:** This rule requires State Medicaid agencies to coordinate the operation of the Medicaid program with the State's operation of the Special Supplemental Food Program for Women, Infants, and Children (WIC) under section 17 of the Child Nutrition Act of 1966. State Medicaid agencies also are required to notify certain individuals of WIC benefits and refer them to the local WIC agencies. This requirement ensures that all Medicaid-eligible individuals who might be WIC-eligible are aware of WIC benefits and how to obtain them. The rule implements section 6406 of the Omnibus Budget Reconciliation Act of 1989.

**EFFECTIVE DATE:** These regulations are effective on August 24, 1992.

**FOR FURTHER INFORMATION CONTACT:** Marinos Svolos, (410) 966-4451.

**SUPPLEMENTARY INFORMATION:****I. Background**

In recent years, Congress has made numerous amendments to title XIX (Medicaid) of the Social Security Act to ensure that low-income pregnant women, infants, and children receive necessary medical assistance as early as possible. These actions have been part of Congress' efforts to prevent infant mortality and low birth weight and to reduce the incidence of health problems among low-income individuals.

States operate a Special Supplemental Food Program for Women, Infants, and Children (WIC) under section 17 of the Child Nutrition Act of 1966. WIC serves low-income pregnant, breastfeeding, and postpartum women and infants and children under age 5 who are determined by a medical professional to be at nutritional risk and who have incomes at or below 185 percent of the Federal poverty level. Women and children eligible for WIC receive nutrition assistance (including vouchers to purchase such items as iron-fortified cereals, infant formula or milk, eggs, juice, and peanut butter), nutrition education, and some health-related

services. Many individuals who are eligible for WIC are also eligible for Medicaid.

**II. Legislative Change**

To ensure that both the Medicaid and WIC programs better serve the health needs of low-income women, infants, and children under age 5, Congress enacted section 6406 of the Omnibus Budget Reconciliation Act of 1989 (OBRA '89), Public Law 101-239, on December 19, 1989, to require State Medicaid agencies to coordinate the States' Medicaid programs with their WIC operations. (The State's WIC program already must include a plan to coordinate operations with Medicaid.) In addition, section 6406 requires States to notify all Medicaid-eligible women who are pregnant, breastfeeding, or postpartum, and all children under age 5 who are eligible for Medicaid, of the availability of the WIC benefits. This notification must occur in a timely manner. States must also provide for the referral of these women and children to the State agencies responsible for administering WIC.

Section 6406 of OBRA '89 added new sections 1902(a)(11)(C) and 1902(a)(53) to the Social Security Act to specify the Medicaid State plan requirements for coordination of Medicaid with WIC. Section 6406 became effective July 1, 1990, without regard to whether regulations to carry out the provisions had been promulgated.

**III. Notice of Proposed Rulemaking**

On December 17, 1990, we issued in the *Federal Register* (55 FR 51735) a notice of proposed rulemaking (NPRM) in which we proposed to incorporate the Medicaid State plan requirements of section 6406 of OBRA '89 in the Medicaid regulations at 42 CFR part 431, subpart M, § 431.635. The statute requires States to notify Medicaid-eligible women who are pregnant, breastfeeding, or postpartum and infants and children under age 5 of WIC benefits in a timely manner. We proposed to require that this notification be in writing and take place as soon as the agency identifies the individual (e.g., at the time of a determination of Medicaid eligibility, including presumptive eligibility of pregnant women), or immediately thereafter (e.g., at the time of notice of eligibility). This interpretation is consistent with Congressional intent expressed in a House Committee Report on provisions included in OBRA '89 (Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 101st Cong., 1st Sess., Report on Medicare and Medicaid Health

Budget Reconciliation Amendments of 1989 (Comm. Print 101-M) (1989)).

A State Medicaid agency may not always be aware that a woman is pregnant, breastfeeding, or postpartum or that a child is under age 5. Therefore, in the December 1990 NPRM, we solicited public comments on whether these individuals can be identified, and if so, how they can be identified. We stated that the notification must be provided to a broad enough group(s) to ensure that all Medicaid-eligible individuals who might be WIC-eligible may be made aware of WIC benefits and how to obtain them. We solicited comments on how this group(s) can be identified and, alternatively, whether notification should be provided annually to all Medicaid recipients. In the NPRM, we proposed to require that the Medicaid agencies, no less frequently than annually, provide written notification concerning WIC to all Medicaid recipients who might be pregnant, breastfeeding, or postpartum or who are under age 5. We proposed that this notification must include information about the availability of WIC benefits and either the location and telephone number of the local WIC agency or instructions on how to obtain further information about WIC. Also, we proposed to require State agencies to effectively inform those individuals who are blind or deaf or who cannot read or understand the English language.

To identify the women who must be notified of WIC benefits and referred to the WIC agency, we proposed to use the definition of postpartum and breastfeeding women, as specified in section 17 of the Child Nutrition Act of 1966 (as directed in the new section 1902(a)(53) of the Social Security Act). A woman is considered postpartum for 6 months after termination of pregnancy and is considered breastfeeding for one year after termination of pregnancy if she is breastfeeding her infant.

**IV. Public Comments on NPRM and Departmental Responses**

We received 16 pieces of timely correspondence in response to the December 17, 1990 NPRM. A summary of these comments and our Departmental responses follow:

**A. State Flexibility**

*Comment:* Twelve commenters recommended that the final rule provide maximum flexibility to the States with regard to the frequency and nature of notification and the target population involved. One commenter suggested a tape-to-tape data exchange in which client identifying information would be



exchanged between agencies via an exchange of computer tapes or other electronic media to facilitate information and referral.

*Response:* We agree that State flexibility should be maximized, but the statutory mandate must be met. Accordingly, we view the coordination requirement, methods, and target populations adopted in this final rule as minimum requirements under section 1902(a) of the Social Security Act. States wishing to adopt procedures that go beyond these minimum requirements are free to do so. However, methods that do not fulfill these minimum requirements are not acceptable. For example, while the suggestion for tape-to-tape data exchange certainly is a laudable practice, it cannot substitute for the basic requirement that States directly notify potentially eligible persons of WIC benefits. A tape exchange merely notifies another agency of a lead, and relies on that agency's procedures and resources to accomplish the actual notification. This is not consistent with the statutory mandate that requires States to notify certain Medicaid-eligible pregnant women and children.

#### B. Outcomes/Best Practices

*Comment:* Three commenters urged HCFA to disseminate information on successful State practices in this area, including monitoring outcome measures.

*Response:* We agree that information sharing is very important and are pleased that a broad network already exists for sharing information. The National Public Welfare Association, the National Governors' Association, the George Washington University Intergovernmental Health Policy Project, and the National Association of WIC Program Directors, to name just a few, monitor and report on progress and best practices in such areas. Additionally, HCFA has recently established an electronic Medicaid bulletin board which facilitates transfer of information among States. We do not believe it would be practical or efficient to replicate the work already being done.

#### C. Definitions of "Postpartum" and "Breastfeeding"

*Comment:* Four commenters supported the proposed definitions of "postpartum" and "breastfeeding" women referenced in the preamble of the NPRM. One commenter suggested that we adopt the definition of breastfeeding women used by the U.S. Department of Agriculture, which states that breastfeeding means the practice of feeding a mother's breast milk to her infant(s) or the average of at least once a day.

*Response:* Section 6406 of OBRA '89 specifies that the definitions of "pregnant women, breastfeeding or postpartum women" be consistent with those in section 17 of the Child Nutrition Act of 1966. In lieu of incorporating any specific definitions of breastfeeding and postpartum in the regulations, we are specifying that these terms have the same meaning as those that are provided in the Child Nutrition Act. We have incorporated language in § 431.635(b) to reflect this position.

#### D. Impact on WIC Resources

*Comment:* Five commenters pointed out that referrals to the WIC program stemming from the Medicaid coordination requirement will result in a strain on WIC resources. Commenters noted that, in some instances, limited WIC program resources may not allow all persons referred to be served.

*Response:* While we recognize that many programs are under financial constraints, that situation does not alter the statutory requirements for coordination and referral. Accordingly, the requirements set out in this final rule apply to all jurisdictions, without regard to the expected capacity of the WIC programs to serve WIC-eligible individuals.

#### E. Cost of Coordination

*Comment:* One commenter noted that the identification, notification, and referral activity required to fulfill this coordination mandate would be costly and suggested that the WIC program share in underwriting these costs.

*Response:* Section 6406 of OBRA '89 expressly requires States to provide for coordination of Medicaid with WIC in their Medicaid State plans. Thus, Congress clearly contemplated that the Federal share of the costs of implementing section 6406 of OBRA '89 would fall to the Medicaid program. A regulatory requirement that the WIC program assume any of these costs would be inconsistent with the statutory provision that allows Federal Medicaid matching funds for States' expenditures under State Medicaid plans. We also note that a similar requirement exists for the WIC program agencies to coordinate their program operations with Medicaid. The costs of meeting this requirement are allowable WIC program costs.

#### F. Presumptive Eligibility

*Comment:* One commenter noted that the proposed regulatory language did not mention determinations of presumptive eligibility for pregnant women as actions triggering notification and referrals, even though the preamble

specifically discussed presumptive eligibility determinations.

*Response:* We agree that the final regulations should specifically encompass determinations of presumptive eligibility to avoid any chance of misinterpretation. Accordingly, we have included in the final regulations specific references to presumptive eligibility determinations in §§ 431.635(c)(2) and 431.635(d)(3).

#### G. Notification of Applicants

*Comment:* Two commenters suggested that the notification and referral requirements be extended to include those applying for Medicaid, not just to Medicaid eligibles.

*Response:* Section 6406 of OBRA '89 mandates that the notice and coordination requirements apply to Medicaid-eligible pregnant women, breastfeeding or postpartum women, and children under age 5. There is no authority to extend this requirement, and the attendant Federal matching funds, to a population beyond that specified in the law. However, States are free to extend notification and referral to other populations, such as persons applying for Medicaid, as long as audit requirements are met that will ensure that claims for Federal matching funds are limited to costs of activities directly related to the population of Medicaid eligibles, as authorized by law.

#### H. Timely Notification

*Comment:* One commenter recommended that a reference to "timely" be added to the regulations under § 431.635(b)(2) (now § 431.635(c)(2)), regarding providing written notification.

*Response:* The statute does specify that notification must occur in a timely manner. The preamble to the proposed regulations recognized this requirement in discussing the notification requirements. Accordingly, we have revised § 431.635(c)(2) to include the term "timely" in regard to when notification must occur. We are not, however, specifying a further definition of "timely". A further Federal definition could not recognize the unique characteristics and capacities of each State Medicaid program and would unduly constrain State flexibility. Existing Federal guidelines on timely processing of Medicaid claims should ensure that eligible persons are notified in a timely manner.



### *I. State Plan Requirement—Identification*

**Comment:** One commenter suggested that the final regulations incorporate a requirement that the State specify in the State plan the method the State will use to identify the targeted population in order to strengthen the effectiveness of the regulation and to achieve a broader notification process.

**Response:** The statute does not explicitly call for States to provide such information in the State plans. Also, we do not believe that this information would be of use in either strengthening the effectiveness of the regulation or ensuring a broader notification process. The regulation clearly sets forth reasonable requirements that fulfill the statutory requirements. We expect States to fulfill the notification and referral requirements in accordance with the clear requirements of the law and regulations. We will monitor State performance to ensure effectiveness and compliance with statutory and regulatory requirements through the established, ongoing process of State compliance with all statutory and regulatory requirements.

### *J. Identification and Notification—Public Suggestions*

**Comments:** Several commenters responded to our request for comments on how best to identify the maximum universe of pregnant, breastfeeding, and postpartum women and children under age 5 and how best to notify these recipients.

One commenter suggested that case-by-case notification at the time of application for Medicaid, coupled with an annual general information/referral notice to all Medicaid recipients, would be acceptable.

Other commenters noted that the way to most surely identify all pregnant, breastfeeding, or postpartum women is to give information about WIC to all persons at the time of the initial Medicaid eligibility determination, as physical conditions that a woman is pregnant, postpartum, and/or breastfeeding may not be readily apparent to an interviewer and a woman may not be aware she is pregnant at the time of the intake interview.

One Commenter pointed out that notification to the target groups can be achieved through computer identification of women using pregnancy-related services and child birthdates. In the commenter's political jurisdiction, quarterly notices regarding the WIC program are sent to all women participating in the pregnant women's

programs, the temporary legalized alien program, and the medically needy program. In addition, notices are sent to AFDC and Medicaid-only cases if the computer database indicates that someone in the case has received a pregnancy-related service in the previous quarter.

One commenter noted that a toll-free telephone number is currently used by the WIC program in their jurisdiction to provide information on clinic locations and how to make appointments. The commenter suggested that such a toll-free number could also serve a useful purpose in giving information/referral to Medicaid recipients. In addition, the commenter suggested adding information/referral material to the forms sent to eligibles in the periodic eligibility redetermination process.

One commenter noted a cooperative agreement already in place between the Medicaid and WIC agencies that provides for written notification about WIC at Medicaid eligibility determinations and written notification about WIC annually on the Medicaid card of every Medicaid recipient.

One commenter recommended that States be encouraged to use the new Medicaid outreach locations required by sections 4602 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508), as referral sources. The commenter also recommended that HCFA encourage States to educate providers of early and periodic screening, diagnosis, and treatment, as well as other pediatric and obstetrical practitioners, of the availability of the WIC program.

**Response:** All of these suggestions are laudable, either as components of, or complements to, the information and referral required by section 6406 of OBRA '89. We do not believe it is feasible to include such detailed descriptions of these examples in the regulations. States are encouraged to use these and other devices or methods as programs to satisfy the requirements of section 6406 are developed and refined.

### **V. Provisions of the Final Regulations**

We are adopting the proposed regulations as final, with the changes discussed in section IV of this preamble. In summary, we are adding to the regulations a reference to the definitions of "breastfeeding," "postpartum," and "pregnant" women as defined in section 17 of the Child Nutrition Act of 1966 (§ 431.634(b)), and a reference to the applicability of the requirements to pregnant women who are determined presumptively eligible for Medicaid (§ 431.635 (c)(2) and (d)(2)). We are also specifying that the State's notification of

WIC benefits must be "timely" (§ 431.635 (c)(2)).

### **VI. Regulatory Impact Statement**

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any final regulation that meets one of the E.O. criteria for a "major rule"; that is, that would be likely to result in—

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In addition, we generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a final regulation will not have a significant economic impact on a substantial number of small entities. For purposes of RFA, we do not consider States or individuals to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any final regulation that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital which is located outside a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule primarily conforms the Medicaid regulations to the legislative provisions of section 6406 of the Omnibus Budget Reconciliation Act of 1989 that are already in effect. The provisions affect only States and certain individuals. Although some States are experiencing or will experience increased costs as a result of preparing and distributing notices about the WIC program to certain Medicaid recipients, we believe the costs are negligible. Federal matching of 50 percent helps offset these costs.

For these reasons, we have determined that a regulatory impact analysis is not required. Further, we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on the operation of a substantial number of



small rural hospitals. Therefore, we have not prepared a regulatory flexibility analysis.

## VII. Paperwork Burden

Section 431.635 contains information collection requirements that are subject to review by the Office of Management and Budget under the requirements of the Paperwork Reduction Act (44 U.S.C. chapter 35). We estimate a reporting burden of 1 hour per State for the State to complete the necessary State Medicaid plan amendments for this statutory requirement and submit them to HCFA. We estimate a paperwork burden of 2 hours for each State to prepare the notices about the WIC program for distribution to certain Medicaid recipients. We have submitted these regulations to OMB for review. A notice will be published in the *Federal Register* when approval is obtained.

### List of Subjects in 42 CFR Part 431

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 431 is amended as follows:

## PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. A new § 431.635 is added under subpart M, to read as follows:

### § 431.635 Coordination of Medicaid with Special Supplemental Food Program for Women, Infants, and Children (WIC).

(a) *Basis.* This section implements sections 1902(a)(11)(C) and 1902(a) (53) of the Act, which provide for coordination of Medicaid with the Special Supplemental Food Program for Women, Infants, and Children (WIC) under section 17 of the Child Nutrition Act of 1966.

(b) *Definitions.* As used in this section, the terms *breastfeeding women*, *postpartum women*, and *pregnant women* mean women as defined in section 17 of the Child Nutrition Act of 1966 (42 U.S.C. 1786(b)).

(c) *State plan requirements.* A State Plan must provide for—

(1) Coordinating operation of the Medicaid program with the State's operation of the Special Supplemental Food Program for Women, Infants, and Children;

(2) Providing timely written notice of the availability of WIC benefits to all individuals in the State who are determined to be eligible (including

presumptively eligible) for Medicaid and who are:

- (i) Pregnant women;
- (ii) Postpartum women;
- (iii) Breastfeeding women; and
- (iv) Children under the age of 5.

(3) Referring individuals described under paragraphs (c)(2) (i) through (iv) of this section to the local agency responsible for administering the WIC program.

(d) *Notification requirements.* (1) The agency must give the written notice required under paragraph (c) of this section as soon as the agency identifies the individual (e.g., at the time of an eligibility determination for Medicaid) or immediately thereafter (e.g., at the time of notice of eligibility).

(2) The agency, no less frequently than annually, must also provide written notice of the availability of WIC benefits, including the location and telephone number of the local WIC agency or instructions for obtaining further information about the WIC program, to all Medicaid recipients (including those found to be presumptively eligible) who are under age 5 or who are women who might be pregnant, postpartum, or breastfeeding as described in paragraphs (c)(2) (i) through (iv) of this section.

(3) The agency must effectively inform those individuals who are blind or deaf or who cannot read or understand the English language.

(Catalog of Federal Domestic Assistance Program No. 93.778—Medical Assistance Program)

**Editorial note:** This document was received by the Office of the Federal Register on June 17, 1992.

Dated: January 14, 1992.

Gail R. Wilensky,  
Administrator, Health Care Financing  
Administration.

Approved: March 3, 1992.

Louis W. Sullivan,  
Secretary.

[FR Doc. 92-14661 Filed 6-23-92; 8:45 am]

BILLING CODE 4120-01-M

## Office of Child Support Enforcement

### 45 CFR Part 303

RIN 0970-AA78

### Child Support Enforcement Program; Federal Parent Locator Service Fees

**AGENCY:** Office of Child Support Enforcement (OCSE), ACF, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Office of Child Support Enforcement operates the Federal

Parent Locator Service (FPLS) as part of its program of assisting States in securing support for children. We have decided to seek reimbursement from States for use of the FPLS in IV-D cases in which the support rights are not required to be assigned to the State, effective with the publication of this rule in final form. States may pay the fees themselves or charge the individuals involved in the case. The user fee is anticipated to be a minimal amount, not exceeding \$1.00 per request.

**EFFECTIVE DATE:** June 24, 1992.

**FOR FURTHER INFORMATION CONTACT:** Andrew J. Hagan, Policy and Planning Division, OCSE, (202) 401-5375.

### SUPPLEMENTARY INFORMATION:

#### Paperwork Reduction Act

There are no information collection requirements in this regulation which require approval under the Paperwork Reduction Act.

#### Statutory Authority

This regulation is published under the authority of sections 453(c)(3), 453(e)(2) and 1102 of the Social Security Act (the Act).

Section 453 of the Act was enacted as part of Public Law 93-647, the Social Services Amendments of 1974. Section 453 established the FPLS and specifies the conditions under which authorized persons may request information concerning the whereabouts of absent parents. Under section 453(c)(3), "the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving aid under part A of this title) (as determined by regulations prescribed by the Secretary) without regard to the existence of a court order against an absent parent who has a duty to support and maintain any such child" is authorized to request information from the FPLS. Section 453(e)(2) requires that "Whenever such services are furnished to an individual specified in subsection (c)(3), a fee shall be charged such individual. The fee so charged shall be used to reimburse the Secretary or his delegate for the expense of providing such services."

Section 1102 of the Act requires the Secretary to publish regulations that may be necessary for the efficient administration of the functions for which he is responsible under the Act.

#### Background

The FPLS is a computerized network through which States may request location information from Federal and State agencies to find absent parents and/or their employers for purposes of



establishing paternity and securing support.

Under the Child Support Enforcement program, each State is required to operate a State parent locator service (SPLS). See regulations at 45 CFR 302.35. The SPLS uses all relevant sources of information available to it in the State, such as unemployment compensation, employer and wage information, tax records, motor vehicle records and property ownership information. In addition, the SPLS has access to the FPLS, which obtains information from Federal and State data bases, such as records of the Internal Revenue Service, the Social Security Administration, the Department of Defense, the National Personnel Records Center, the Selective Service, the Department of Veterans Affairs, and the State Employment Security Agencies.

The process of obtaining this location information is carefully controlled under regulations at 45 CFR 303.70 and by program instructions. A State request must come only from SPLS offices and authorized local offices. States must submit an annual certification, signed by the director of the State child support enforcement agency (known as the IV-D agency) or his/her designee attesting that requests are being made solely to locate an individual for Child Support Enforcement program purposes, or in connection with a parental kidnapping and child custody case as authorized by Public Law 96-611. All information obtained through the FPLS must be safeguarded and treated as confidential.

Until now, the FPLS only charged for non-IV-D locate-only and parental kidnapping and child custody cases. (See OCSE-AT-76-3, dated February 13, 1976.)

#### Changes to Previous Regulations

Fees for use of the FPLS in child support enforcement cases were previously covered in regulations at § 303.70(e) (1), (2), (4), and (5). Under paragraph (e)(1), the State IV-D agency had to pay the fees required under section 453(e)(2) of the Act. Under paragraph (e)(2), the IV-D agency was required to charge the fee to the resident parent, attorney or agent of a child who is not receiving aid under title IV-A of the Act. (Previously, this had been interpreted to mean an individual who has requested locate-only services.) Paragraph (e)(4) required that the fee be reasonable and as close to actual costs as possible so as not to discourage use of services by authorized individuals. Under paragraph (e)(5), the Office of Child Support Enforcement (OCSE) collected the fees from the IV-D agency by an offset of the State's quarterly

grant award. Other parts of paragraph (e) cover FPLS fees charged to States for location requests made in parental kidnapping and child custody cases.

In this document, we revised § 303.70(e)(1) to make clear that, effective upon publication, the State must pay the FPLS fee in any child support case in which individuals are not required to assign their support rights to the State. This is consistent with the requirements of section 453(e)(2) of the Act, and the original intent of Congress in 1975, that a fee shall be charged to reimburse the Secretary for the expense of operating the FPLS. Moreover, we are using our authority under section 1102 of the Act to expand the cases not subject to the fee to include, in addition to AFDC cases, other IV-D cases in which an assignment of support rights to the State is required (i.e., IV-E foster care and Medicaid cases).

We revised paragraph (e)(2) to permit the State to charge the resident parent, attorney or agent of a child the fee or to pay the fee itself without charging the individual. This provision in paragraph (e)(2)(i) conforms to Federal policy in previous paragraph (e)(3) on FPLS fees paid in parental kidnapping and child custody cases. The new paragraph (e)(2)(i) gives States the same payment option in all three types of cases (IV-D cases in which no assignment of support rights to the State is required, non-IV-D locate-only cases in which location of an absent parent is the only service requested, and parental kidnapping and child custody cases). Paragraph (e)(2)(ii) allows the IV-D agency to recover the fee from the absent parent in non-IV-D cases and repay the individual requesting information or itself, similar to the option for application fees for non-IV-D cases under § 302.33. Paragraph (e)(2)(iii) provides that the payment of a fee by the IV-D agency is not a reimbursable expense under the IV-D program. Rather, such amounts would be counted as program income and, in accordance with § 304.50, would be excluded from quarterly expenditure claims. The previous paragraph (e)(3) was deleted.

We redesignated the previous paragraph (e)(4) as new paragraph (e)(3). It continues to require that fees be reasonable and as close to actual costs as possible so as not to discourage use of the FPLS.

Previous paragraph (e)(5) provided that the Federal government collect the fees from the States by an offset of the quarterly grant awards. This process was contained in previous paragraph (e)(6) and may be summarized as follows:

The Federal government will charge the IV-D agency periodically for the costs of processing requests to use the FPLS. Previously, an additional fee was charged for those cases submitted without a Social Security number (SSN). With the new fee structure, the same per case fee will be charged for cases submitted with or without an SSN.

If a State fails to pay the fees charged, use of the FPLS may be suspended for cases subject to the fees until payment is received. Finally, fees shall be transmitted in the amount and manner prescribed by the OCSE in instructions. The procedures for Federal collection of fees outlined above are contained in a new paragraph (e)(4) that covers fees in applicable child support cases and all parental kidnapping and child custody cases. Previous paragraphs (e) (5) and (6) were deleted.

As explained later in response to comments, we have also revised the standards for program operations regarding location of absent parents, at § 303.3, by deleting § 303.3(b)(6) which had required IV-D agencies to resubmit to the FPLS at least annually cases in which location was needed, previous attempts to locate had failed, and which met the requirements for submittal.

We expect that States have mechanisms in place to collect and transmit the fees with minimal lead time, since they have already developed procedures for handling FPLS user fees in parental kidnapping and child custody and non-IV-D locate-only cases. If any administrative costs are incurred by States in implementing this fee, States may wish to consider such costs when setting their cost recovery procedures, if they have elected in their State plans to recover costs in non-AFDC cases. Based on the number of requests for FPLS services anticipated for FY 1991, we expect to recover approximately 687,000 dollars per year through the charges imposed by this regulation.

#### Fees Previously in Effect

Most of the billing and payment procedures, extended in this regulation to all child support cases subject to a fee, had been in effect for parental kidnapping and child custody cases since 1981 when the final regulations on use of the FPLS in parental kidnapping and child custody cases were published. These procedures resulted in a direct payment to the OCSE, through an HHS account, and expedited availability of funds specific to operation of the FPLS.

Under previous policies on use of the FPLS in parental kidnapping and child custody cases (OCSE Action



Transmittal 81-12, dated June 15, 1981), we charged a fee of \$10 for each request that contained a social security number, and an additional fee of \$4 for each request submitted without a social security number. If the social security number could not be found, the \$10 fee was not charged since location requests could not be processed without this number. A similar fee was charged for non-IV-D locate-only requests pursuant to OCSE-AT-82-17 (dated November 12, 1982). States were notified by action transmittal in advance of any change in the fee amounts. States are billed on an annual basis to minimize the administration and paperwork connected with this process.

OCSE has reviewed the costs and determined a user fee which is substantially less than was previously charged. We considered the costs of fees charged by the Internal Revenue Service and State Employment Security Agencies, the associated costs of the National Child Support Computer Center, OCSE's related costs, including salary and benefits of OCSE FPLS and systems support personnel, telephones and building costs, mailings, training, personal computer and supplies, the cost of the contractor which provides support to the FPLS, and other relevant costs. We expect the fee to be approximately \$1.00 per request.

An Action Transmittal will be issued setting forth fees and procedures for billing and payment for all requests sent to the FPLS in parental kidnapping and child custody cases and cases in which an assignment of support rights to the State is not required. We will review costs periodically and make adjustments to the fee and revise the Action Transmittal, if appropriate. This final regulation supersedes OCSE-AT-76-3.

#### Response to Comments

We received 65 comments on the Notice of Proposed Rulemaking published in the *Federal Register* November 15, 1990 (55 FR 47777), including comments from State and local IV-D agencies and child advocacy groups. Comments and our responses are as follows.

#### Statutory Authority

*Comment:* One commenter questioned why OCSE should start charging FPLS fees after 15 years of not charging fees for FPLS services. Three commenters challenged the legal basis for the proposal, claiming that the legislation provided for the FPLS fee to be charged only for parental kidnapping and child custody cases and non-IV-D locate-only cases.

*Response:* The Social Security Amendments of 1975 (Pub. L. 93-647), enacted January 4, 1975, established title IV-D of the Act and the FPLS. Section 453(e)(2) provides that: " \* \* \* Whenever such services are furnished to an individual specified in subsection (c)(3), a fee shall be charged such individual. The fee so charged shall be used to reimburse the Secretary or his delegate for the expense of providing such services." Section 453(c) of the Act specifies the "authorized person" authorized to receive information as to the whereabouts of the absent parent includes "the resident parent, legal guardian, attorney, or agent of a child [other than a child receiving aid under part A of this title] \* \* \*." (emphasis added). The legislative history of Pub. L. 93-647, specifically the deliberations of the Senate Committee on Finance (Senate Report 93-1356: page 55), provided that "(i)n the case of parent location services, a fee would be charged in non-welfare cases." Senate Report No. 93-1356 further specified, on page 55, "(t)hat collection activities for non-welfare families are thus envisioned as being self-financing, unless a State decides that it does not want to charge for the cost of the service." The original Federal legislation for child support enforcement services under title IV-D of the Act, Pub. L. 93-647, required fees for the FPLS be charged in non-IV-D cases. Current economic and budgetary problems warrant the charging of the minimal FPLS fees contained in these regulations.

*Comment:* One commenter referenced a recent legislative proposal, requiring State child support enforcement agencies to pay for FPLS services, which Congress rejected, as "proof" that we lack legislative authority to charge fees for the use of the FPLS. The same commenter suggested that Federal legislation allows fees only for application, IRS offset, and genetic testing, and that FPLS fees are not authorized. Two commenters suggested that, rather than OCSE charging a fee for each submittal, each State be charged a flat fee for access to the FPLS so that States could plan for a specific amount in its budget tracking systems.

*Response:* The recent legislative proposal referenced by the commenter was to charge the States fees for use of the FPLS, while this regulation implements the existing statutory requirement that non-IV-D individuals pay fees for access to the FPLS location services. We have not proposed to charge a flat fee to each State for access to the FPLS. Additionally, States have had extensive experience with using the

FPLS and should have an adequate basis from which to project future budgetary requirements. Besides, the charging of FPLS fees on the basis of the number of submittals may encourage States to exhaust their State and local resources before referring a case to the FPLS.

*Comment:* One commenter suggested that OCSE obtain clearance of the FPLS fee proposal by the IV-D Directors' Policy Committee before the FPLS fee policy is promulgated.

*Response:* We believe that the procedures required under the Administrative Procedures Act for providing an opportunity for public comment on proposed regulations before the final regulations are published provide sufficient opportunity for public input during the rulemaking process.

#### Cases Subject to FPLS Fees

*Comment:* Several commenters requested clarification about whether former recipients of public assistance would also be exempt from the FPLS fee.

*Response:* No, former recipients of public assistance are not exempt from the FPLS fee. This regulation, at 45 CFR 303.70(e)(1), requires the IV-D agency to pay the fee in cases other than those in which there is an assignment of support rights as defined in 45 CFR 301.1. Only current recipients of AFDC, non-AFDC Medicaid, and title IV-E foster care services are exempt from the FPLS fee. As with applicants for IV-D services, States have the option to charge the former recipient of public assistance, eligible for IV-D services under 45 CFR 302.33(d)(1)(ii) (as published in the *Federal Register* on February 26, 1991 (56 FR 7988)), for the costs of the FPLS fee or to absorb the cost of the FPLS fee out of State funds. States may recover the cost of the FPLS fee from the absent parent and reimburse the individual requesting information, or itself, as appropriate.

*Comment:* Several commenters opposed the proposal distinguishing between cases with Federally-required assignment of support rights to the State and those without such assignment, claiming that the proposal discriminated against those without such assignment and denied those without such assignments due process under the Constitution. One commenter suggested we charge a smaller fee and charge the fee in all cases, including those with Federally-required assignment of support rights to the State, in order to facilitate tracking for billing.

*Response:* The statute prohibits charging FPLS fees in AFDC cases. Under section 453(c)(3) and 453(e)(2) of



the Act, FPLS fees must be charged to the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving aid under title IV-A of the Act).

*Comment:* Two commenters expressed concern that the charging of FPLS fees for cases without assignment of support rights to the State, coupled with the cap on non-AFDC incentives payments, appears to be encouraging the provision of less services to non-AFDC applicants for IV-D services. Two commenters were "extremely concerned" that the FPLS fees proposal is a "precursor" to additional user fees.

*Response:* The charging of FPLS fees should not discourage IV-D agencies from providing the full range of IV-D services to all those in need. The nominal fee for submitting a case without a required assignment of support rights to the State can be absorbed by the State or charged to the individual requesting information. States also have the option to recover the cost of the FPLS fee from the absent parent and repay the individual requesting information or itself, as appropriate. Charging FPLS fees in cases without an assignment is consistent with the Congressional intent with respect to the 1975 legislation that non-welfare cases pay for the cost of accessing FPLS location sources.

*Comment:* The majority of commenters strongly objected to the charging of FPLS fees since the States are also required to access the FPLS in initial location attempts, under 45 CFR 303.3(b)(3), and annually thereafter, under 45 CFR 303.3(b)(6). One commenter suggested that OCSE charge the FPLS fee only for the first FPLS submittal in each case, with subsequent FPLS submittals on the same case being free.

*Response:* In response to comments, we deleted 45 CFR 303.3(b)(6) which had required States to resubmit appropriate cases annually to the FPLS when location services were still required. States are required, under 45 CFR 303.3(b)(3), to access all appropriate location sources, including transmitting appropriate cases to the FPLS. However, if location information sufficient to take the next appropriate action in a case can be obtained without submittal of the case to the FPLS, submittal would not be necessary. Since the FPLS has a broad range of location sources which are otherwise unavailable to the States, we strongly encourage States to resubmit cases to the FPLS when their efforts to locate the absent parent using their own location resources have been unsuccessful. The Federal regulations, at 45 CFR 303.3(b)(5), still require repeat

location attempts where previous attempts failed but adequate identifying and other information exists to meet requirements for submittal. We particularly encourage States to resubmit a case to the FPLS before closing the case due to failure to locate the absent parent.

*Comment:* Two commenters asked if the same FPLS fee would be charged for FPLS submittals in which location information is needed in parental kidnapping and child custody or non-IV-D locate-only cases.

*Response:* The FPLS fee will be the same for all parental kidnapping and child custody cases and all non-IV-D locate-only cases.

#### **Amount of Fee—Impact on States or Individuals**

*Comment:* Several commenters expressed concern that their States would be unable to afford the costs of the FPLS fees or of establishing a process to recover the costs from the individual requesting information or the absent parent.

*Response:* As provided in 45 CFR 303.70(e)(2) (i) and (ii), the IV-D agency has the option to charge the costs of the FPLS fees to the person requesting the FPLS information or to pay the cost itself, as well as the option to attempt to recover the cost of the FPLS fee from the absent parent. Federal matching funds are available to the IV-D agency at the prevailing matching rate for the costs of establishing and maintaining the administrative procedures for charging the individual requesting information, and, at State option, recovering the costs from the absent parent and repaying the individual requesting information or itself, as appropriate.

*Comment:* Two commenters questioned whether the charging of FPLS fees was the most cost-effective way to increase collections under the IV-D program, and suggested that States could improve their collections more efficiently if they used the money instead for hiring additional staff.

*Response:* The charging of FPLS fees is intended to carry out the intent of Congress that persons not receiving assistance who benefit from the location services of the FPLS should bear the costs. It is not intended to increase collections under the IV-D program. We emphasize that absorbing the cost of the FPLS fees is an option for States, not a requirement. States may charge the individual requesting the information. States also have the option to recover the cost of the FPLS fees from the absent parent and repay the individual requesting information or itself, as appropriate.

*Comment:* One commenter requested that OCSE allow States to use other location resources from the private sector if these other resources are more cost-effective than the FPLS.

*Response:* If a State is able to successfully locate the absent parent within the 75-day timeframe required in 45 CFR 303.3(b)(3), using location resources other than the FPLS, then submittal of the case to the FPLS would not be necessary.

*Comment:* One commenter pointed out that States might be less likely to use the FPLS since fees are being charged. This could lead to a delay in location and possibly to applicants for IV-D services becoming eligible for public assistance for lack of child support collections.

*Response:* Since the Federal regulations, at 45 CFR 303.3(b)(3), require IV-D agencies, within 75 days of determining that location is necessary, to access all appropriate location sources, including the FPLS, States' use of the FPLS should not decrease for appropriate cases. States which aggressively pursue State and local location information may be able to complete location services for many IV-D cases without submitting them to the FPLS, which would reduce their need for FPLS services. Timeframes for providing location services should ensure location services are not delayed.

*Comment:* The regulations, at 45 CFR 303.70(e)(4)(ii), provide that if a State fails to pay the FPLS fee for cases submitted, FPLS services may be suspended for cases subject to the FPLS fee until the State pays the fees. Two commenters expressed concern that families needing FPLS services would be denied access to the FPLS if their State were under suspension for failure to pay.

*Response:* We do not expect that States which opt to absorb the cost of the FPLS fees, rather than charging the individual requesting information or recovering the cost from the absent parent, would then refuse to pay the FPLS fee and face suspension. However, a State which fails to meet Federal requirements for use of the FPLS in appropriate cases may be found not to have complied with State plan requirements and could be subject to audit penalties.

*Comment:* One commenter requested definite information on the amount of the FPLS fee, in order to allow the IV-D agency to adequately plan its budget.

*Response:* Based upon current operating costs, it is anticipated that, for those cases eligible for a fee, the cost will be approximately \$1.00 per case. Each year, the cost will be reassessed



and adjusted if necessary. The States will be notified if the fee is changed. The OCSE Annual Report to Congress provides the number of location requests submitted by each State to the FPLS for the last five years. Using this data, the States will be able to project the approximate number of cases they will submit and, therefore, the costs they can expect to incur. Upon request, the FPLS will provide the State with the number of cases submitted last year.

We will charge each State for the number of non-IV-D and parental kidnapping and child custody cases submitted to the FPLS by that State. Again, it is recommended that, whenever appropriate, States exhaust State and local locate resources before referring a case to the FPLS.

*Comment:* One commenter stated that opposition to the fee could be overcome by granting the commenter direct computer access to the FPLS, which would speed up the receipt of location information. One commenter requested a differential fee structure for the FPLS fees, where submittals by tape exchange would be charged less.

*Response:* At the request of the State IV-D Director and upon subsequent approval by OCSE, large jurisdictions can obtain direct access to the FPLS. With direct access, the user can expect to receive information from all matches, except those done quarterly, within an average of one to three weeks from the date they submit the case to the FPLS. We are not establishing a differential fee structure since the amount of data processing required and the charges imposed on the FPLS are comparable regardless of the format in which the cases are submitted.

*Comment:* One commenter requested that the regulation specify a "cap" on the FPLS fee, with any subsequent increase allowable only through the regulatory process.

*Response:* As has been the case with FPLS fees charged for non-IV-D locate-only cases and for parental kidnapping and child custody cases, we will use the Action Transmittal process when, and if, there is a need for any subsequent revision to the amount of the FPLS fee. While the charging of fees is addressed in regulations, we believe it is appropriate to set the amount of the fees in program instructions. Since the FPLS fees are to cover only the costs to the Federal government of operating the FPLS, the costs will be set accordingly. Some costs (e.g., salaries, equipment, and overhead) are fixed, while others (e.g., computer processing time and agency charges) fluctuate with volume. Continued improvements in the databases and technology will allow the FPLS to be even more efficient, and should limit the need for cost adjustments.

*Comment:* One commenter expressed concern that the proposed regulation did not specify the amount of the additional FPLS fee to be charged when the submittal does not include a social security number (SSN). One commenter does not include a social security number (SSN). One commenter requested clarification about whether the additional fee for cases with no SSN would be charged only in parental kidnapping and child custody cases and non-IV-D locate-only cases or in all IV-D cases without an assignment of support rights to the State. Also, would the FPLS submittal fee be refunded if the case was submitted without a SSN and there is no SSN found?

*Response:* States will be charged approximately \$1.00 per case for all non-IV-D locate-only cases and parental kidnapping and child custody cases submitted to the FPLS. No additional fee will be charged for a case submitted without a SSN. The FPLS fee would not be refunded if the case was submitted without a SSN and no SSN is found, since the FPLS fee is based upon submittal of the case, even when location information is not found.

*Comment:* One commenter requested clarification about whether there will be an additional fee for processing location submittals through the State Employment Security Administrations (SESAs).

*Response:* Since the FPLS fee is based on the total costs of operating the FPLS, including the costs of processing location submittals through the SESAs, there is no additional fee for this service.

*Comment:* One commenter suggested that the present process of offsetting the quarterly OCSE payment to the States, under 45 CFR 303.70(e)(5), is preferable to the proposed billing system.

*Response:* At present, the commenter's suggested process is not available for charging the States for their FPLS submittals. We are exploring avenues which will allow this option and will notify States of the procedures through the Action Transmittal process.

#### Quality of FPLS Data

*Comment:* Commenters pointed out that other location information resources, including some Federal sources, are better, cheaper and provide more timely information. Commenters also complained that FPLS data is quite out-of-date by the time the State or local agency receives the information and that the absent parents often have moved already. Additionally, commenters pointed out that other resources are more cost-effective than FPLS, and charge the State IV-D agencies only when the submittal results in a successful location.

One commenter suggested that the

FPLS fees should only be assessed if the location information is later verified. One commenter expressed concern regarding the need to improve both the data in the FPLS system and the timeliness of responding to requests, and suggested that FPLS fees should not be charged if more than thirty days pass before the location information is sent to the State or local IV-D agency.

*Response:* Many State sources provide State level location data that is more current than the national level data provided by the FPLS. If the IV-D agency believes that the absent parent is residing in-state, we encourage the IV-D agency to use their own in-state resources before submitting cases to the FPLS. If the absent parent is not found by using State level sources, the FPLS is the only source for accessing national Federal databases.

The currency of the locate information provided by the FPLS is not within the control of the FPLS. Rather, the currency of the information is determined by the frequency with which each of the agencies updates its database. Therefore, the currency of the data ranges from very current, such as State Employment Security Agency (SESA) unemployment data and Social Security Administration (SSA) benefit information, to data which are a year old, such as National Personnel Record Center (NPRC) data. The time of year of the request and the frequency with which the source agency allows the FPLS to conduct matches also impacts on the currency of the data. For example, the Internal Revenue Service (IRS) provides the address reported when filing income tax returns. Therefore, address data are very current during and right after Federal income tax returns are filed. The data become progressively less current throughout the year.

The FPLS is continuously looking for additional and more current sources of location information that could be accessed. For example, the quarterly SESA crossmatches implemented in 1990 have provided the most current wage and unemployment data available.

The turnaround time for receipt of information from the FPLS depends upon how often the agency with location information permits us to conduct a crossmatch and the data processing capabilities of the State or local jurisdiction to whom we forward the information. The FPLS conducts crossmatches weekly with SSA and the IRS, bi-weekly with the Selective Service System (SSS), Department of Defense (DOD) and NPRC, bi-monthly with the Department of Veterans Affairs (DVA), and quarterly with the IRS (for SSN search) and SESAs. The FPLS does not maintain a database of addresses.



Information received from the cooperating agencies is passed on to the requesting jurisdiction within days of receipt by the FPLS. Therefore, the average turnaround time from the day of submittal to the FPLS is one to three weeks, with the exception of the quarterly matches. The submitting IV-D agency may experience a longer response time due to the time required by their State data processing staff to process the FPLS tape and forward the information to the local offices.

*Comment:* Two commenters stated that the FPLS is the least effective source of location information and one commenter suggested that OCSE propose to Congress to abolish the FPLS.

*Response:* Using the FPLS is the only way that States can access Federal databases. If the absent parent is living out of State, the FPLS may provide the best possible leads available. While the absent parent may not be at the address provided by the FPLS, these leads provide valuable information for the IV-D agency to use in skip tracing. Skip tracing is the process of using whatever information is available to the IV-D agency to develop a plan for locating the absent parent. For example, if the FPLS can only provide former employment information on the absent parent, the IV-D agency should contact the former employer for any additional leads. Or, if the FPLS can only provide a former address, the IV-D agency should contact the U.S. Postal Service, or the former landlord/landlady, for information as to where the absent parent may now live.

In fact, in 1990, States requested the assistance of the FPLS in locating the absent parent and/or his/her employer in over 3 million cases. Location information was provided to the submitting IV-D agencies in 79 percent of the cases submitted with a SSN.

Sometimes data that appears to be out of date may, in fact, provide the best lead available. For example, SSA data is older and updated less frequently than SESA data. However, in conducting an evaluation of SESA data we determined that SSA does provide a good lead in determining in which State the absent parent may reside.

For the SESA evaluation, we submitted the same 100,000 cases to both SSA and 42 participating SESAs. SSA provided addresses on 68,113 cases and the SESAs provided addresses on 46,756 cases.

In 23,345 cases, no address was found in either database.

In 38,244 of the 100,000 cases, an address was found by both SSA and the SESAs. In 82 percent of these cases, the address of the absent parent provided by the SESA was in the same State as

the address obtained from SSA. Furthermore, in 56 percent of these cases both the SESA and SSA provided addresses for the absent parent that were in the same zip code.

*Comment:* One commenter recommended that OCSE use the funds generated by the FPLS fees to improve the FPLS database, stating that such an improvement would in part compensate States for the additional costs incurred.

*Response:* The funds generated by the FPLS fees will cover the costs to the Federal government of operating the FPLS, including the costs of processing the submittals and the fees charged by the agencies for providing the data. The FPLS is continuously researching the feasibility of accessing additional databases and enhancing FPLS operations as the need arises.

#### Charging the Individual Requesting Information

*Comment:* Several commenters pointed out that the IV-D agency would not be able to collect the FPLS fees up front from the individual requesting information since the IV-D agency would not know whether the use of the FPLS would be necessary in a particular case or how many times the case might be referred to FPLS. There would also be an administrative dilemma regarding reimbursing the individual requesting information if the IV-D agency were to collect sufficient money to allow several submittals and then located the absent parent on the first attempt. Two commenters also expressed concern that IV-D agencies would run afoul of the cost recovery requirements, which provide that cost recovery must be done on a case-by-case basis.

*Response:* States which choose to charge the FPLS fee to the individual requesting location information, rather than to pay the FPLS fee without charging the individual, may charge the individual only when that case is submitted to the FPLS. If the case is later resubmitted, the State may, at that time, again charge the individual requesting information for the FPLS fee. Since additional referrals may not be necessary, it would be inappropriate to charge for multiple submittals on the same absent parent at one time. Likewise, a State that elects to recover the costs of the FPLS fees from the absent parent could recover the costs if the case is submitted to the FPLS. If the case is later resubmitted, the State may attempt to recover the costs for each time the case was submitted.

*Comment:* Several commenters expressed concern that if the IV-D agency were to bill the individual requesting information and then await

payment before submittal of the case to FPLS, the seventy-five day timeframe for location efforts, at 45 CFR 303.3(b)(3), would not be met in many cases. Two other commenters asked whether the IV-D agency would be exempt from referring cases to FPLS if the individual requesting information refused to pay the FPLS fee. Also, two commenters requested clarification about whether the IV-D agency would be allowed to close the IV-D case if the individual requesting information refused to pay the FPLS fee.

*Response:* States that choose to collect the FPLS fee from the individual requesting information, rather than paying the FPLS fee without charging the individual, would still be responsible for meeting program standards location timeframes in 45 CFR 303.3(b)(3). If the individual requesting information refused to pay the FPLS fee and all other appropriate location efforts (in accordance with 45 CFR 303.3) were unsuccessful, and submittal of the case to the FPLS was the only avenue left, the IV-D agency would be able to close the case under the case closure criterion at 45 CFR 303.11(b)(12). This allows case closure if, in a non-AFDC case, the IV-D agency documents the circumstances of the custodial parent's non-cooperation and an action by the custodial parent is essential for the next step in providing IV-D services. The IV-D agency also must meet the requirements for case closure notification at 45 CFR 303.11(c), including notifying the custodial parent in writing 60 calendar days prior to closure of the case of the State's intent to close the case. The case must be kept open if the custodial parent then cooperates in response to the notice, or reopened after closure at the custodial parent's request if there is a change in circumstances, that is, the custodial parent decides to cooperate.

*Comment:* Many commenters pointed out that the applicants for IV-D services are often quite poor and would not be able to afford the additional fee. Some commenters suggested that without the assistance of the IV-D agency, many of these families would eventually have to apply for public assistance. One commenter stated that the State would not want to charge the individual requesting information the FPLS fee since the fee might discourage the individual requesting information from applying for IV-D services. Many commenters strongly objected to an additional fee, and demanded that absent parents be charged the cost, since the FPLS process would not be necessary if the absent parents were



meeting their responsibilities. Several commenters strongly objected to paying the State IV-D Agency any additional fees since these agencies are not effectively pursuing the absent parents in their individual cases.

**Response:** Each State has the option to charge the individual requesting information or to absorb the cost of the FPLS fee. Each State also has the option to recover the costs of the FPLS fee from the absent parent to repay the individual requesting information or itself, as appropriate. The FPLS fee is paid to OCSE for the costs to the Federal government of operating the FPLS.

**Comment:** Three commenters indicated that the interstate process would be hindered by the charging of the FPLS fees and requested that OCSE specify that the initiating State is responsible for the costs of the FPLS fees, by either charging the individual requesting information or absorbing the cost itself. One commenter pointed out that there would be particular difficulties in interstate cases if the initiating State were to pay the FPLS fees and the responding State would be responsible for recovering the costs from the absent parent.

**Response:** Responding States are not required to submit cases to the FPLS (see 45 CFR 303.3(b)(4)). The initiating State submits the case to the FPLS and then, if the absent parent is located in another State, refers the case to the responding State for child support enforcement services. However, if a responding State were to submit a case to the FPLS, the responding State would be charged the FPLS fee. We recognize the difficulties that an initiating State would face in recovering the cost of the FPLS fee from the absent parent. However, recovery of the FPLS fee from the absent parent is only one of the three options a State would have to finance the cost of submitting cases to the FPLS.

#### Cost Recovery

**Comment:** Many commenters expressed concern that the administrative procedures to recover the FPLS fees from the absent parent or billing the individual requesting information would "require complex administrative procedures to perform billing, accounting and revenue functions." One commenter expressed concern that the time, money, and energy for assessing, billing, collecting, and accounting for the FPLS fees would be better spent on more important provision of IV-D services. Many commenters expressed concern that the costs of the FPLS fees recovery process would outweigh the amount of the

recovered costs, at both the Federal and State levels. One commenter pointed out that even if the State were to collect the FPLS fee from either of the parents, the IV-D agency would not get that money, which would instead go to the State's general revenue fund.

**Response:** Each State has the option to absorb the cost of the FPLS fee if the State believes that the cost of the administrative procedures to collect the FPLS fee from the individual requesting information or to recover the cost from the absent parent would not be cost-effective. Federal matching at the prevailing financial reimbursement rate would be available for the costs of developing and operating such administrative procedures. States will have to consider their individual State's policy regarding fees going into the general revenue fund rather than to the IV-D agency when deciding whether to charge the individual requesting information, recover the cost from the absent parent, or absorb the cost of the FPLS fee itself.

**Comment:** Many commenters questioned whether recovery from the absent parents would be feasible since cost recovery would occur only after the actual child support was collected, and there is no assurance that location would even result in support collections. One commenter pointed out that the cost of getting the fee reduced to a judgment and the other costs, such as tracking the costs, and billing the absent parents, would make the recovery more expensive than the amount that would be recovered.

**Response:** We agree with the commenter that recovering the fee from absent parents may not be feasible or cost-effective under certain circumstances. States have the option to charge the fee to the individual requesting information or absorb the fee, as well as the option to recover the fee charged from the absent parent. If a State determines that charging the absent parent is not the best approach, it may elect to absorb the fees itself.

**Comment:** One commenter requested we revise the Federal regulations on the enforcement techniques to allow the use of the enforcement techniques for this cost recovery, and any other recovery of costs.

**Response:** Statutory prohibitions preclude the use of the Federal income tax refund offset process for the collection of fees from the absent parent. However, the IV-D agency may use the other enforcement techniques, available under section 466 of the Act and 45 CFR 302.70, for collection of the FPLS fee from the absent parent, if authorized under State law and

procedures. The State may also use other enforcement techniques available under State law to recover the fee charged.

Please note that any amount collected from the absent parent must be treated first as a payment on the current support obligation before fees are collected.

#### Program Income

**Comment:** Many commenters suggested that section 455 of the Act requires OCSE to reimburse States for the administrative costs of operating their IV-D programs, and the FPLS fees are administrative costs eligible for Federal reimbursement. One commenter pointed out that the FPLS fees proposal could be seen as comparable to the application fee. One commenter questioned how payment of the FPLS fee can be considered income when expended at submittal of the case to FPLS, when the income would actually not be collected until recouped from the individual. The commenter worried that the fee would be counted a second time when the fee was collected from the individual.

**Response:** Section 455(a)(1) of the Act requires that "(I)n determining the total amounts expended by any State during a quarter, for purposes of this subsection, there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan approved under this part." The FPLS fee is like the IV-D application fee in that, if a State decides to absorb the fee rather than collect it, State funds used to pay the FPLS fee are not program expenditures for purposes of claiming Federal matching funds and are considered as program income. The cost will be incurred when the case is submitted to the FPLS. Any collection of the amount of the fee from the individual requesting information or recovery of the fee from the absent parent would not be counted a second time.

**Comment:** Some commenters pointed out that although States are prohibited from claiming Federal reimbursement for the costs of paying the FPLS fees, States would expect Federal reimbursement for the administrative costs of developing a system for the billing, payment tracking, and other expenses associated with charging the individual requesting information the FPLS fee or recovering the FPLS fee from the absent parent.

**Response:** As previously addressed, Federal matching funds at the prevailing rate would be available for the costs of developing and maintaining the



administrative procedures of collecting the fee from the individual requesting information or recovering the fee from the absent parent.

*Comment:* One commenter requested that OCSE allow States to exclude the costs of the FPLS fees from the incentive calculations under 45 CFR 304.12, as is allowed for the costs of genetic tests.

*Response:* The Child Support Enforcement Amendments of 1984 (Pub. L. 98-378) amended section 458 of the Act to allow for the exclusion of the costs of genetic testing from State administrative costs in the calculation of the incentive payment. While the costs of genetic testing are considered program expenditures, these regulations, at 45 CFR 303.70(e)(2)(iii), specify that State funds used to pay the fee under section 453(e)(2) are not program expenditures under the State plan. Therefore, the costs of the FPLS fees would not be considered in the incentive calculations under 45 CFR 304.12.

#### Miscellaneous

*Comment:* One commenter suggested that the FPLS fees NPRM was a major rule since the proposal would cause major increase in costs to State and local IV-D agencies.

*Response:* We do not believe that the regulation should be considered a major rule since the costs of the FPLS fees are expected to be minor, less than a million dollars across the 54 States and jurisdictions. Executive Order 12291 considers a major rule to be one which is likely to have an annual effect on the national economy of \$100 million or more.

*Comment:* Several commenters requested that OCSE delay the effective date of the FPLS fees regulation since some State IV-D agencies would need lead time to request additional budgetary authority from their State legislatures or to develop mechanisms for collecting and transmitting the FPLS fees. Other commenters said they need the lead time to incorporate the accounting requirements for the FPLS fees into their management information systems. Another commenter said they would need the lead time to promulgate their own State regulations to their local IV-D agencies, and that process cannot begin until the Federal regulations are published. One State would be seeking authority to ensure that the fees collected from the individual requesting information or recovered from the absent parent would be earmarked to reimburse the agency rather than go into the State's general revenue fund.

*Response:* We do not believe that delay in the effective date for the charging of FPLS fees is appropriate.

States have been on notice since at least the November 15, 1990, publication of the proposed regulation that OCSE was considering a change to the IV-D regulations to charge for the costs of operating the FPLS.

#### Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), we are required to prepare a regulatory flexibility analysis for those rules which would have a significant economic impact on a substantial number of small entities. Because the impact of these regulations is on States and, at State option, individuals, these regulations would not have a significant economic impact on a substantial number of small entities and a regulatory flexibility analysis is not required.

#### Regulatory Impact Analysis

The Secretary has determined, in accordance with Executive Order 12291, that this rule does not constitute a "major" rule for the following reasons:

- (1) The annual effect on the economy would be less than \$100 million;
- (2) This rule would not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and
- (3) This rule would not result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### List of Subjects in 45 CFR Part 303

Child support, grant programs/social programs, reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Program No. 93.023, Child Support Enforcement Program)

Dated: July 29, 1991.

Jo Anne B. Barnhart,  
Assistant Secretary for Children and Families.

Dated: January 6, 1992.

Louis Sullivan,  
Secretary.

#### PART 303—STANDARDS FOR PROGRAM OPERATIONS

1. The authority citation for part 303 continues to read as follows:

Authority: 42 U.S.C. 651 through 658, 660, 663, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p) and 1396(k).

#### § 303.3 [Amended]

2. For the reasons set forth in the preamble, we are receiving 45 CFR 303.3(b)(6).

3. For the reasons set forth in the preamble, we are revising 45 CFR 303.70(e) to read as follows:

#### § 303.70 Requests by the State Parent Locator Service (SPLS) for information from the Federal Parent Locator Service (FPLS).

(e)(1) The IV-D agency shall pay the fees required under:

(i) Section 453(e)(2) of the Act in IV-D cases in which there is no assignment of support rights to the State under § 301.1 of this chapter and in non-IV-D locate-only cases in which the location of an absent parent is the only service requested; and

(ii) Section 454(17) of the Act in parental kidnapping and child custody cases.

(2)(i) The IV-D agency may charge an individual requesting information, or pay without charging the individual, the fee required under sections 453(e)(2) and 454(17) of the Act.

(ii) The State may recover the fee required under section 453(e)(2) of the Act from the absent parent who owes a support obligation to a family on whose behalf the IV-D agency is providing services and repay it to the individual requesting information or itself.

(iii) State funds used to pay the fee under section 453(e)(2) of the Act are not program expenditures under the State plan but are program income under § 304.50 of this chapter.

(3) The fees required under sections 453(e)(2) and 454(17) of the Act shall be reasonable and as close to actual costs as possible so as not to discourage use of the FPLS by authorized individuals.

(4)(i) For costs of processing requests for information under sections 453(e)(2) and 454(17) of the Act, the Federal government will charge the IV-D agency periodically. A fee will be charged for submitting a case to the FPLS for location information.

(ii) If a State fails to pay the appropriate fees charged by the Office under this section, the services provided by the FPLS in cases subject to the fees may be suspended until payment is received.

(iii) Fees shall be transmitted in the amount and manner prescribed by the Office in instructions.

\* \* \* \* \*

[FR Doc. 92-14780 Filed 6-23-92; 8:45 am]  
BILLING CODE 4150-04-M



**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[MM Docket No. 91-127; RM-7346, RM-7375, RM-7445, RM-7711]

**Radio Broadcasting Services; Richmond Hill, GA, Estill, Blackville, Branchville and Walterboro, SC**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of Thoroughbred Communications, Inc., (formerly Richmond Hill Broadcasting), substitutes Channel 287C3 for Channel 287A at Richmond Hill, Georgia, and modifies Station WRHQ(FM)'s construction permit to specify operation on the higher class channel. At the request of Eutaw Broadcast Associates, Channel 286A is allotted to Branchville, South Carolina, as the community's first local FM service. Channel 229A is substituted for Channel 287A at Walterboro, South Carolina, and Station WONO's construction permit is modified to specify the alternate Class A channel. At the request of Williams Communications, the proposal to allot Channel 250C3 to Estill, South Carolina, and substitute Channel 239A for unoccupied but applied for Channel 250A at Blackville, South Carolina, is dismissed. At the request of Toni T. Rinehart, the proposal to allot Channel 229A to Edisto Beach, South Carolina, is dismissed. See 56 FR 19968, May 1, 1991, and **SUPPLEMENTARY INFORMATION**, *infra*. With this action, this proceeding is terminated.

**DATES:** Effective August 3, 1992. The application filing window for Channel 286A at Branchville, South Carolina, will open on August 4, 1992, and close on September 3, 1992.

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's First Report and Order, MM Docket No. 91-127, adopted May 28, 1992, and released June 19, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

Channel 287C3 can be allotted to Richmond Hill in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.3 kilometers (12 miles) northeast to avoid short-spacings to the allotment and construction permit coordinates for Station WHVL, Hinesville, Georgia, to two pending applications for Channel 287A at Fernandina Beach, Florida, and to Station WIFO-FM, Jesup, Georgia, at coordinates North Latitude 31-59-42 and West Longitude 81-06-40. Channel 286A can be allotted to Branchville without the imposition of a site restriction, at coordinates 33-15-06; 80-49-00. Channel 229A can be allotted to Walterboro with a site restriction of 10.2 kilometers (6.3 miles) east, at coordinates 32-55-00; 80-33-00.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

**PART 73—[AMENDED]**

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by removing Channel 287A and adding Channel 287C3 at Richmond Hill.

**§ 73.202 [Amended]**

3. Section 73.202(b), the Table of FM Allotments under South Carolina, is amended by adding Branchville, Channel 286A, and by removing Channel 287A and adding Channel 229A at Walterboro.

Federal Communications Commission.

Beverly McKittrick,

Assistant Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 92-14861 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

**47 CFR Part 73**

[MM Docket No. 92-55; RM-7939]

**Radio Broadcasting Services; Quincy, CA**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document substitutes Channel 262C3 for Channel 262A at Quincy, California, and modifies the construction permit for Station KSPY (FM) to specify operation on the higher powered channel, as requested by John K. LaRue. See 57 Fed. Reg. 10749, March

30, 1992. Coordinates for Channel 262C3 at Quincy are 40-02-41 and 120-53-04. With this action, the proceeding is terminated.

**EFFECTIVE DATE:** August 3, 1992.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 92-55, adopted June 3, 1992, and released June 19, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street, N.W., Washington, DC 20036.

**List of Subjects in 47 CFR Part 73**

Radio Broadcasting.

**Part 73—[AMENDED]**

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 262A and adding Channel 262C3 to Quincy.

Federal Communications Commission.

Beverly McKittrick,

Assistant Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 92-14862 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

**47 CFR Part 73**

[MM Docket No. 89-547; RM-6899; RM-7021; RM-7100; RM-7102]

**Radio Broadcasting Services; Hannahs Mill and Milledgeville, GA**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document grants a petition for reconsideration filed by Radio Georgia, Inc. of that portion of the Report and Order in this proceeding which made an allotment of Channel 266A to Hannahs Mill, Georgia. See 56 FR 30510, July 3, 1991. We will delete Channel 266A from Hannahs Mill, Georgia, after determining on reconsideration that Hannahs Mill is not a community for allotment purposes.



With this action, the proceeding is terminated.

**EFFECTIVE DATE:** August 3, 1992.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Beaty, Mass Media Bureau, (202) 634-5430.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 89-547, adopted June 4, 1992, and released June 18, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street NW., Washington, DC 20036.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

#### PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

##### § 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by removing Channel 266A, Hannahs Mill.

Federal Communications Commission.

Douglas W. Webbink,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 92-14869 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 212

[FRA Docket No. RSSP-3, Notice No. 4]

RIN 2130-AA65

#### Revision of State Safety Participation Regulations

**AGENCY:** Federal Railroad Administration (FRA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This document revises the FRA regulations on State participation in railroad safety inspections and investigations with respect to the transportation of hazardous materials. The revisions are necessary to implement the expanded authority contained in the Hazardous Materials Transportation Uniform Safety Act of

1990 (HMTUSA). The objective of these revisions is to expand the existing program to include State hazardous materials inspectors.

**EFFECTIVE DATE:** This regulation will become effective on July 24, 1992.

**FOR FURTHER INFORMATION CONTACT:** Phil Olekszyk, Office of Safety, Federal Railroad Administration, Washington, DC 20590. Telephone: (202) 366-0510. Arnold Gross, Office of Safety, Federal Railroad Administration, Washington, DC 20590. Telephone: (202) 366-0536. Christine Beyer, Trial Attorney, Office of Chief Counsel, FRA, Washington, DC 20590. Telephone: (202) 366-0635 or (202) 366-0443.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 206 of the Federal Railroad Safety Act of 1970 (Safety Act), 45 U.S.C. 435, provides for a state role in investigation and surveillance activities with respect to safety regulations issued by FRA. Regulations implementing section 206 of the Safety Act, referred to as the State Participation Program, were published on December 18, 1973 (38 FR 34748), amended on November 28, 1974 (40 FR 55508) and now are found at 49 CFR part 212. The 1970 Safety Act, however, initially did not permit state participation with respect to the older Federal railroad safety laws, such as the Safety Appliance Acts (45 U.S.C. 1-16), the Hours of Service Act (45 U.S.C. 61-64b), the Signal Inspection Act (49 U.S.C. 26), and the Locomotive Inspection Act (45 U.S.C. 22-34), and FRA's state participation regulations reflected this limitation.

Section 4 of the Federal Railroad Safety Authorization Act of 1980, Public Law 96-423, 94 Stat. 1812 (October 10, 1980), authorized FRA to expand the state program to include participation in investigative and surveillance activities under the older Federal railroad safety statutes. Regulations implementing this expansion and revising 49 CFR part 212 were published on September 16, 1982 (47 FR 41048). However, because the Hazardous Materials Transportation Act ("HMTA"), 49 App. U.S.C. 1801 *et seq.*, was not among the statutes referred to in the 1980 amendment, states were not yet authorized to enforce the Federal regulations issued under that statute.

Section 28 of the Hazardous Materials Transportation Uniform Safety Act of 1990, Public Law 101-615, 104 Stat. 3244 (November 16, 1990) amended section 206 of the Safety Act to permit state inspection and surveillance under any Federal regulation "related to railroad safety." The legislative history makes

clear that the amendment was expressly intended to make the hazardous materials regulations issued under the HMTA one of the Federal railroad safety laws covered by FRA's state participation program. 136 Cong. Rec. S16867 (daily ed. October 23, 1990) (statement of Sen. Exon). Pursuant to that authority, FRA now revises part 212 to include qualification requirements for state personnel engaged in the inspection of railroads, shippers, and manufacturers who transport hazardous material by railroad, offer such material for transportation by railroad, cause such material to be transported by railroad, or manufacture bulk containers for the transport of such material by railroad.

On June 13, 1991, FRA published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (56 FR 27222) to revise the State Safety Participation Program regulations. The specific objective of the proposed revision included expansion of the existing program to provide for State hazardous materials inspectors and to make minor editorial changes where necessary to facilitate FRA's expanded authority with respect to hazardous materials safety inspections.

FRA held a public hearing on the proposal on August 21, 1991. Although no witnesses appeared to present testimony, FRA did receive written comments from six State agencies. All of these comments have been reviewed and fully considered during the formulation of this final rule.

All commenters expressed support for the proposed revisions, but recommended changes to one or more sections, primarily the qualification requirements set forth in § 212.227. Most of the commenting State agencies stated that the proposed requirements were too stringent and would, in fact, preclude the hiring of many qualified applicants. In response, the final rule permits the States to consider additional relevant experience in lieu of four years of managerial experience when making hiring decisions.

Also, Oregon's Public Utility Commission and Washington's Utilities and Transportation Commission noted that their authority extends only to railroads, not to shippers and other entities regulated by the hazardous materials regulations. State agencies that are restricted in this way are nonetheless free to participate in the program to the full extent of their authority. Since shipper compliance is an important part of this program, FRA urges these agencies to work toward obtaining full authority to permit the



most efficient use of State and Federal resources, but FRA will not exclude any State from the program simply because that State agency lacks authority over entities other than railroads.

The following is a further summary of written comments received and an explanation of the revisions made by FRA in response to those comments.

#### Section-by-Section Analysis

##### Subpart A—General

###### Section 212.3 Definitions.

Oregon questioned the definition of "manufacturer" as it relates to the proposed qualification requirements, suggesting that the two together would require applicants to have extensive engineering knowledge. As now written, an engineering background is not the sole method of meeting the qualification requirements. However, FRA believes that such a background is valuable and pertinent to completing the tasks of a hazardous materials inspector successfully. Many of our current inspectors have engineering degrees or experience.

In order to clarify the entities subject to the hazardous materials transportation regulations and the authority of participating state inspectors, the final rule now contains a definition of "shipper" that did not appear in the NPRM. This definition tracks the statutory language, and includes those companies or individuals that actually offer shipments for transportation, as well as those that arrange for or in any way cause such transportation.

###### Section 212.101 Program Principles.

Oregon believes that certain language in paragraph (b)(1) of this section, ("FRA and State inspections determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to inspection, maintenance, training, and supervision") could be construed to mean that FRA inspectors must also have knowledge of and inspect for compliance with the regulations of the Environmental Protection Agency and the Occupational Safety and Health Administration. FRA does not intend this language to be construed in such a way, and in fact, our inspectors do not have the authority to enforce the regulations of another Federal agency.

Oregon also raised a question about the extent of FRA-State interface with respect to inspections in light of the language of paragraphs (b)(1) and (c) of this section. Paragraph (b)(1) describes the inspection efforts carried out by

FRA and State inspectors, and paragraph (c) states that FRA maintains oversight of railroad, shipper, and manufacturer conditions by conducting inspections in concert with participating State agencies. This section sets forth the manner in which all railroad transportation can be monitored nationally to ensure safety. FRA inspectors and inspectors from participating State agencies are authorized to conduct safety inspections and cite violations where necessary; those violations are then submitted to FRA headquarters for review and enforcement action. By retaining responsibility for final review and enforcement, FRA has the ability to see that enforcement policies are carried out consistently throughout the country, and to determine where problematic trends are developing.

###### Section 212.105 Agreements.

This section has required that the agreement under which states participate in the rail safety program accurately assert that the State has jurisdiction over the safety practices of railroad operations in that State. The proposal added shipper and manufacturing operations to this requirement, reflecting the expanded authority contained in the Hazardous Materials Transportation Uniform Safety Act of 1990. Oregon and Washington agencies submitted comments in which they assert that their jurisdiction is limited by State charter to railroads. Therefore, these States cannot enforce the Federal hazardous materials transportation regulations through their railroad safety units with respect to shippers and manufacturing companies that operate within the state or cause hazardous materials to be transported within the state. However, those States with limited jurisdiction may participate in the program to the full extent of their authority. The final rule makes clear the jurisdiction over railroads is the prerequisite for a State's participation, but requires that the agreement state whether the State agency has jurisdiction over the other entities as well. Clearly, FRA would prefer that all participating States actively enforce the Federal regulations against shippers and manufacturers, as well as railroads, but those state agencies that cannot do so will not be omitted from the program for that reason.

It is also important to note that the language of this subsection, specifically "the agency has jurisdiction over safety practices applicable to railroad, shipper, and manufacturer \* \* \* operations in that State," does not limit the

participating State's authority to those railroads, shippers, and manufacturers who maintain a continuing physical presence in the State. Participating State inspectors will be enforcing current Federal regulations that apply throughout the United States, regardless of a shipment's origin; accordingly, those inspectors can enforce those regulations against entities whose activities have caused violations to occur in their states. As long as a violation is detected within the State's borders, the fact that the violation originated in another State is no bar to enforcement action by the State where the violation was detected.

###### Section 212.109 Joint planning of inspections.

No comments were received; this section is adopted as proposed.

###### Section 212.201 General qualifications of State inspection personnel.

This section requires State hazardous materials inspectors to have basic knowledge of the organization of shippers and manufacturers. Missouri suggested that this information is best handled on a case-by-case basis by individual inspectors, and should not be included in the general qualification requirements. FRA believes that being familiar with the dock procedures, shipping paper preparation, and supervisory personnel of the shippers and manufacturers in an inspector's assigned territory is pertinent to proper inspection, surveillance, and enforcement for which the inspector is responsible.

###### Section 212.227 Hazardous materials inspector.

State agencies from Oregon, Washington, Nevada, and Missouri submitted comments concerning the proposed qualification requirements for hazardous materials inspectors. Each agency stated that the requirements were unreasonably strict and would exclude many qualified applicants. The agencies noted that existing State salary limits would not attract candidates who could meet the proposed standards. In response, FRA has amended the proposal to provide States more flexibility. These new standards do not permit less qualified inspectors into the program, but they do permit the States to consider experience and education factors that did not appear in the NPRM. State agencies can now consider applicants with a bachelor's degree in a related technical field, applicants with two or more years of managerial experience related to enforcement of the Federal hazardous materials regulations,



or applicants with four years of recent experience in connection with those regulations. Typical related technical fields would include chemistry, chemical engineering, mechanical engineering, civil engineering, fire safety engineering and general engineering. The four-year managerial experience requirement has been reduced to two years, since FRA believes that two full years of such responsibilities will adequately prepare an applicant for the inspection and surveillance program. Finally, the rule now provides that applicants with four years of recent experience related to the enforcement of the Federal hazardous materials regulations can qualify to be State inspectors. This requirement would be filled by individuals who have worked on loading docks, inside manufacturing or shipper plants, or in railroad yards or offices where hazardous materials compliance activities were part of the job, or who have prepared, packaged, placed, loaded, or unloaded hazardous material shipments in compliance with the Federal regulations. Examples of specific job categories that meet this requirement are quality control specialist, technician, or loading rack employee in an industrial plant that regularly ships hazardous materials by railroad; tank car repairman; AAR Bureau of explosives inspector; State policeman or fireman trained in hazardous materials response techniques; and engineers, conductors, trainmasters, road foremen, or mechanics employed by railroads that regularly transport hazardous materials.

In connection with the qualification requirements, one State agency suggested that FRA permit hazardous materials cross-training for State inspectors who are currently working in another railroad safety discipline. Due to its limited training budget, FRA, which will provide the training, cannot expend valuable resources on inspectors who will be working in the hazardous materials area on a part-time basis only. Also, FRA believes that the hazardous materials discipline is a complex and potentially dangerous area, and therefore demands the full attention of these inspectors.

#### *Section 212.229 Apprentice hazardous materials inspector.*

One commenter suggested that an interim "compliance" inspector be developed to fit between the apprentice inspector level and the full hazardous materials inspector, and that this inspector be required to meet less stringent qualification criteria. As suggested, this inspector would inspect only railroads, particularly in those

states that do not have authority to inspect shippers and manufacturers. FRA believes that the amended qualification standards in the final rule considerably enlarge the pool of qualified applicants. The apprentice program permits those candidates who do not have adequate work or educational backgrounds to enter the program and obtain immediate training and experience. FRA can see no value in adding a third tier to the State inspection program given the added flexibility in the final rule. Also, the State hazardous materials inspection program is patterned after the programs for all other railroad safety disciplines, which have been very successful.

#### **Regulatory Impact**

##### *Executive Order 12291 and DOT Regulatory Policies and Procedures*

The final rule has been evaluated in accordance with existing regulatory policies and procedures and is considered to be non-major under Executive Order 12291. Also, it is not considered to be significant under DOT policies and procedures (44 FR 11304, February 26, 1979) since it merely conforms the provisions of the existing regulatory program to the new statutory authorization.

#### **Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities. This final rule will only affect State governments and will not have an adverse economic impact on any entity because it does not place any new requirements or burdens on the public. Therefore, it is certified that the rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act.

#### **Paperwork Reduction Act**

This rule will require modifications to the paperwork package for the information collection requirements contained in the Safety Participation Regulations (49 CFR 212) (OMB Approval Number 2130-0509). FRA estimates that approximately 10 states will participate and expand their existing programs to provide for State hazardous materials inspectors. Revised § 212.109 will increase the burden for the annual work plan for the ten participating states by 100 hours (10 states × 10 hours each). FRA estimates that approximately 20 hazardous materials inspectors will be involved and proposed new Section 212.227 will

increase the annual burden for submitting inspection reports to FRA as follows:

(1) Motive Power and Equipment Inspection Report (FRA 6180.59 and 6180.59A)—2,600 hours (2,600 reports × 1 hour each);

(2) Operating Practices Inspection Report (FRA 6180.65 and 6180.65A)—3,750 hours (5,000 reports × 45 minutes);

(3) Violation of Operating Practices/Hazardous Materials Regulations (FRA 6180.67)—400 hours (800 reports × 30 minutes each).

Total annual burden increase for the State Safety Participation Regulations is 6,850 hours. All estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments or suggestions for reducing these burdens to Gloria D. Swanson, Office of Safety, RRS-21, Federal Railroad Administration, 400 7th Street, SW., Washington, DC 20590; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, ATTN: Desk Officer for FRA (OMB No. 2130-0509), 726 Jackson Place, NW., Washington, DC 20503. Copies of any such comments should also be submitted to the docket of this rulemaking at the address provided above.

#### *Environmental Impact*

FRA has evaluated this final rule in accordance with its procedures for ensuring full consideration of the environmental impact of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and DOT Order 5610.1c. This final rule meets criteria establishing this as a non-major action for environmental purposes.

#### **Federalism Implications**

FRA's State Participation Program permits the States to join in existing Federal railroad safety inspection activities. Participation by the States is entirely voluntary, and the addition of State hazardous materials inspectors to the program as set forth in this final rule will not change the voluntary nature of the program in any way.

This final rule does not directly regulate the States, does not in any way interfere with functions essential to the States' separate and independent existence, and does not displace the States' freedom to structure integral operations in areas of traditional governmental functions. Also, the final



rule does not affect the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

#### List of Subjects in 49 CFR Part 212

Hazardous materials transportation, Intergovernmental relations, Investigations, Railroad safety, Reporting and recordkeeping requirements.

#### The Final Rule

In consideration of the foregoing, part 212, title 49, Code of Federal Regulations is amended to read as follows:

1. The authority citation for part 212 is revised to read as follows:

Authority: Secs. 202, 205, 206, and 207, of the Federal Railroad Safety Act of 1970, as amended (45 U.S.C. 431, 434, 435, and 438; and 49 CFR 1.49).

2. By amending § 212.3 to revise paragraphs (d)(5) and (d)(6); add paragraph (d)(7); redesignate paragraph (e) as paragraph (g); and add new paragraphs (e) and (f) to read as follows:

#### Section 212.3 Definitions.

(d) \* \* \*

(5) The Accident Reports Act, as amended (45 U.S.C. 38-42);

(6) The Hours of Service Act, as amended (45 U.S.C. 61-64(b); and

(7) The Hazardous Materials Transportation Act (49 app. U.S.C. 1801 *et seq.*), as it pertains to shipment or transportation by railroad.

(3) *Manufacturer* means a person that manufactures, fabricates, marks, maintains, reconditions, repairs, or tests containers which are represented, marked, certified, or sold for use in the bulk transportation of hazardous materials by railroad.

(f) *Shipper* means a person that offers a hazardous material for transportation or otherwise causes it to be transported.

3. By amending § 212.101 to revise paragraphs (b)(1) and (c) to read as follows:

#### Section 212.101 Program principles.

(b)(1) The national railroad safety program is carried out in part through the issuance of mandatory Federal safety requirements and through inspection efforts designed to monitor compliance with those requirements. FRA and State inspections determine the extent to which the railroads,

shippers, and manufacturers have fulfilled their obligations with respect to inspection, maintenance, training, and supervision. The FRA and participating States do not conduct inspections of track, equipment, signal systems, operating practices, and hazardous materials handling for the railroads, shippers, and manufacturers.

(c) It is the policy of the FRA to maintain direct oversight of railroad, shipper, and manufacturer conditions and practices relevant to safety by conducting inspections and investigations in concert with participating State agencies.

4. By amending § 212.105 to revise paragraph (e)(1)(i) to read as follows:

#### Section 212.105 Agreements.

(e) \* \* \*

(1) \* \* \*

(i) The agency has jurisdiction over the safety practices of the facilities, equipment, rolling stock, and operations of railroads in that State and whether the agency has jurisdiction over shippers and manufacturers;

5. By revising § 212.109 to read as follows:

#### Section 212.109 Joint planning of inspections.

Prior to the beginning of each calendar year, each participating State applying for grant assistance under subpart D of this part shall develop, in conjunction with the FRA Regional Director of the region in which the State is located, an annual work plan for the conduct of investigative and surveillance activities by the State agency. The plan shall include a program of inspections designed to monitor the compliance of the railroads, shippers, and manufacturers operating within the State (or portion thereof) with applicable Federal railroad safety laws and regulations. In the event the participating State and the FRA Regional Director cannot agree on an annual work plan, the Associate Administrator for Safety shall review the matter.

(Approved by the Office of Management and Budget under control number 2130-0509)

6. By amending § 212.201 to revise paragraphs (d)(5) and (f) to read as follows:

#### Section 212.201 General qualifications of State inspection personnel.

(d) \* \* \*

(5) Basic knowledge of rail transportation functions, the organization of railroad, shipper, and manufacturer companies, and standard industry rules for personal safety.

(f) In addition to meeting the requirements of this section, each inspector and apprentice inspector shall meet the applicable requirements of §§ 212.203 through 212.229 of this subpart.

7. By redesignating § 212.227 as § 212.231 and by adding new §§ 212.227 and 212.229 to read as follows:

#### Section 212.227 Hazardous materials inspector.

(a) The hazardous materials inspector is required, at a minimum, to be able to conduct independent inspections to determine compliance with all pertinent sections of the Federal hazardous materials regulations (49 CFR parts 171 through 174, and 179), to make reports of those inspections and findings, and to recommend the institution of enforcement actions when appropriate to promote compliance.

(b) The hazardous materials inspector is required, at a minimum, to have at least two years of recent experience in developing, administering, or performing managerial functions related to compliance with the hazardous materials regulations; four years of recent experience in performing functions related to compliance with the hazardous materials regulations; or a bachelor's degree in a related technical specialization. Successful completion of the apprentice training program may be substituted for this requirement.

(c) The hazardous materials inspector shall demonstrate the following specific qualifications:

(1) A comprehensive knowledge of the transportation and operating procedures employed in the railroad, shipping, or manufacturing industries associated with the transportation of hazardous materials;

(2) Knowledge and ability to understand and detect deviations from the Department of Transportation's Hazardous Materials Regulations, including Federal requirements and industry standards for the manufacturing of bulk packaging used in the transportation of hazardous materials by railroad;

(3) Knowledge of the physical and chemical properties and chemical hazards associated with hazardous materials that are transported by railroad;

(4) Knowledge of the proper remedial actions required to bring railroad,



shipper, and/or manufacturing facilities into compliance with the Federal regulations; and

(5) Knowledge of the proper remedial actions required when a hazardous materials transportation accident or incident occurs.

*Section 212.229 Apprentice hazardous materials inspector.*

(a) The apprentice hazardous materials inspector must be enrolled in a program of training prescribed by the Associate Administrator for Safety leading to qualification as a hazardous materials inspector. The apprentice may not participate in investigative and surveillance activities, except as an assistant to a qualified State or FRA inspector while accompanying that qualified inspector.

(b) An apprentice hazardous materials inspector shall demonstrate a basic knowledge of the chemical hazards associated with hazardous materials that are transported by railroad, including requirements such as shipping papers, marking, labeling, placarding, and the manufacturing and maintenance of packagings associated with these shipments.

Issued in Washington, DC on June 16, 1992.

Gilbert E. Carmichael,

*Federal Railroad Administrator.*

[FR Doc. 92-14581 Filed 6-23-92; 8:45 am]

BILLING CODE 4910-06-M

## 49 CFR Part 214

[FRA Docket No. ROS-2, Notice No. 1]

RIN 2130-AA48

### Bridge Worker Safety Rules

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation.

**ACTION:** Final rule.

**SUMMARY:** FRA is establishing safety standards for the protection of those who work on railroad bridges. The rule requires railroads and railroad contractors to provide, and employees to use, fall protection and personal protective equipment, including head, foot, eye, and face equipment for employees as they work on railroad bridges. Also, standards are set forth for scaffolding. The purpose of this rule is to prevent accidents and casualties to employees involved in certain railroad inspection, maintenance and construction activities.

**EFFECTIVE DATE:** The rule becomes effective on August 24, 1992.

**ADDRESSES:** Any petition for reconsideration should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street SW., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Bill O'Sullivan, Chief, Track Division, Office of Safety, FRA, Washington, DC 20590. Telephone: (202) 366-6594; Edward R. English, Director, Office of Safety Enforcement, Office of Safety, FRA, 400 Seventh Street SW., Washington, DC 20590 (telephone: 202-366-9252); Bob Greear, Industrial Hygienist, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone: 202-366-0506) or Christine Beyer, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street SW., Washington, DC 20590 (telephone: 202-366-0443).

**SUPPLEMENTARY INFORMATION:** Section 19 of the Rail Safety Improvement Act of 1988 ("RSIA"), Public Law 100-342, 102 Stat. 624 (June 22, 1988), amend section 202 of the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. 431, by adding new subsection (n), which provides that FRA shall " \* \* \* issue such rules, regulations, orders, and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used."

On January 30, 1991, FRA published a Notice of Proposed Rulemaking on Bridge Worker Safety Standards (56 FR 3434) ("NPRM") that set forth proposals to address those hazards encountered by railroad bridge employees. The proposal included standards for fall protection, personal protective equipment, and contingencies for working over or adjacent to water. As noted in the preamble of the NPRM, pertinent, applicable regulations promulgated by the Occupational Safety and Health Administration ("OSHA") existed, but confusion concerning the authority and enforcement of those standards was prevalent. FRA determined that the safety interests of railroad employees would best be served through a regulatory program of its own.

FRA solicited written comments on the proposal and conducted a public hearing on May 1, 1991 to gather further information. As a result of those comments and through additional investigation, FRA now publishes its final rule. The rule sets forth a comprehensive regulatory program to address and reduce the exposure to risk faced by those who work on railroad

bridges, including personal fall arrest systems, safety nets, standards for scaffolding, contingencies for working over or adjacent to water, and head, eye, face, and foot protection. While FRA now adopts these standards as part of our existing railroad safety program, these regulations follow the guidelines set forth by OSHA's construction and general industry standards. There are several reasons for this. Because OSHA's existing regulations apply to railroad employees until the effective date of this rule, FRA necessarily made every attempt to ensure that the rule does not encompass safety rules that will in any way diminish the protection bridge workers are currently afforded under OSHA's authority. Also, OSHA's primary mission involves developing industry and construction work practices that will decrease or prevent occupational hazards. Many federal agencies and manufacturers rely on OSHA's research abilities and expertise in formulating procedural guidelines and performance criteria that reduce exposure to the risk of injury in the workplace. FRA is relying on OSHA's greater expertise in occupational health and safety as well as FRA's own expertise on railroad safety.

The final rule addresses a broad range of safety concerns that confront railroad bridge workers. However, where additional working conditions exist that are not addressed in this rulemaking, such as exposure to lead, respiratory, hearing and welding protection, or hazard communication standards, the OSHA regulations that address these subject areas apply.

### General Summary of Public Comments

FRA received comments from the Brotherhood of Maintenance of Way Employees ("BMWE"), the United Transportation Union ("UTU"), American Association of Railroads ("AAR"), the American Short Line Railroad Association ("The Short Line Association"), individual members of some of these organizations, OSHA, the State of Maryland's Division of Industry and Labor, Osmose Wood Preserving, Inc. (a bridge renovation company), Sinco Products, Inc. (a fall protection manufacturing and installation company), and individual members of the public.

Most comments focused on the height threshold at which fall protection becomes mandatory, the requirement of safety nets, the adequacy of our respiratory protection proposal, and the applicability of existing OSHA regulations. Each of these subjects is



outlined in detail in the Section-by-Section Analysis that follows.

The issues of welding protective equipment and lead exposure standards were also raised by certain commenters. Given the likelihood that railroad bridge workers will confront each of these hazards in bridge repair and maintenance, the commenters expressed concern that the Bridge Worker Safety Standards did not address these subject areas. While FRA concurs that these hazards are prevalent and that railroad employees who work on bridges must be protected from these dangers, existing regulations administered and enforced by OSHA comprehensively address these concerns. FRA's Policy Statement (43 FR 10583, March 14, 1978) set forth which Federal agency would maintain authority to regulate workplace safety hazards for railroad employees. OSHA, long recognized as the agency expert in occupational health issues, would cover those areas that required health-related expertise, and FRA would maintain primary authority to address safety issues intrinsic to the railroad environment. Welding protective equipment and lead exposure standards fall within those areas requiring extensive health-based expertise and are therefore, best regulated by OSHA. FRA therefore defers to OSHA's existing authority with respect to these issues, but with publication of this final rule asserts authority over the personal safety issues addressed by part 214 that can be readily included in routine inspections for fall protection.

The UTU expressed concern that the Bridge Worker Safety Standards did not require walkways and railings on all railroad bridges. The UTU stated that operating employees are sometimes required to crawl beneath equipment stationed on a railroad bridge to perform inspections, and that these employees would benefit from a universal walkway requirement. FRA has determined that such a requirement should not be undertaken for several reasons. FRA is not aware of circumstances in which operating employees are required to crawl beneath equipment on bridges, and would act to prevent any such requirement. Also, as was discussed in the NPRM, FRA extensively reviewed the issue of mandatory walkways for all railroad bridges and determined that such requirements would be less safe, as well as quite expensive. In addition, the statutory mandate that prompted this rulemaking proceeding was directed specifically at safety issues directly affecting maintenance-of-way employees, not operating employees. Finally, FRA has, in fact, included

walkways in this final rule as one type of fall protection that railroads or railroad contractors may utilize in lieu of personal fall arrest systems or safety nets. In addition, those walkways must meet certain height and strength standards.

#### Section-by-Section Analysis

As proposed, the Bridge Worker Safety Standards were to become a subpart of 49 CFR part 218, Railroad Operating Practices. However, FRA has determined that these standards more logically fit in a new separate part, entitled Railroad Workplace Safety, located at 49 CFR part 214. FRA also revised section titles and reorganized the order in which they appear in the final rule. These changes are set forth in the Redesignation Table below:

REDESIGNATION TABLE

NPRM	Final rule
§ 218.5 Definitions.....	Subpart A—General.
§ 218.71 Purpose and scope.	§ 214.1 Purpose and scope.
§ 218.72 Walkways and railings.	§ 214.3 Application.
§ 218.73 Safety belts, lifelines and lanyards.	§ 214.5 Responsibility for compliance.
§ 218.74 Safety nets.....	§ 214.7 Definitions.
§ 218.75 Working over or near water.	Subpart B—Bridge worker safety standards.
§ 218.76 Respiratory protection.	§ 214.101 Purpose and scope.
§ 218.77 Head protection.	§ 214.103 Fall protection, generally.
§ 218.78 Scaffolding.....	§ 214.105 Fall protection systems standards and practices.
§ 218.79 Personal protective equipment.	§ 214.107 Working over or adjacent to water.
§ 218.80 Food protection.	§ 214.109 Scaffolding.
§ 218.81 Eye and face protection.	§ 214.111 Personal protective equipment, generally.
	§ 214.113 Head protection.
	§ 214.115 Foot protection.
	§ 214.117 Eye and face protection.

The section-by-section analysis that follows is organized according to the section number and order used in the final rule, with reference to the former section number used in the NPRM.

#### Section 214.1 Purpose and Scope

##### Proposed Rule

This section was not contained in the proposed rule.

*Comments:* No comments received.

##### Final Rule

Paragraph (a) of this section states that the purpose of the new part 214 is to

prevent accidents and casualties to employees involved in certain railroad inspection, maintenance, and construction activities. Paragraph (b) states that these regulations provide minimum standards for the subjects addressed, and that railroads and contractors may adopt more stringent requirements, so long as they are not inconsistent with this part.

This section incorporates standard introductory language that was not necessary in the NPRM when the proposed regulations were going to be part of 49 CFR Part 218, Railroad Operating Practices. Because a new part in the Code of Regulations is being established with this final rule, the scope and purpose of the rule must be set forth in order to assure proper application of these regulations. This section limits application of the safety standards set forth in this part to those inspection, maintenance, and construction activities described in Subpart B, Bridge Worker Safety Standards, and any additional subparts that may follow. FRA does not in any way intend that Part 214, Railroad Workplace Safety, be read to establish standards for any occupational hazards beyond those addressed by this part.

#### Section 214.3 Application

##### Proposed Rule

This section was not contained in the proposed rule.

*Comments:* No comments received.

##### Final Rule

This section states that part 214 applies to all railroads operating rolling equipment on track that is part of the general railroad system. As discussed above, this section was not necessary in the NPRM, but must now be included to ensure that the entities subject to the regulations addressed by part 214 are defined. Should FRA later determine that this rule should apply to certain self-contained railroads that are not part of the general system (e.g., certain tourist railroads), it will propose a new rule to accomplish that change. Such a proceeding could explore whatever unique factors apply in the context of such railroads.

#### Section 214.5 Responsibility for Compliance

##### Proposed Rule

This section was not contained in the proposed rule.

*Comments:* No comments received.



**Final Rule**

This section states that all persons who violate the standards of this part are subject to a civil penalty, and explains the circumstances under which an individual may be assessed a penalty. The RSIA established liability for individuals who willfully violate any of the railroad safety regulations. The authority to impose penalties against individual violators exists with respect to all of the safety standards enforced by FRA, but with the addition of § 214.5 in this final rule, FRA now expressly incorporates that authority in part 214. In addition, as a logical concomitant of this provision, various provisions requiring that certain forms of protection be provided have been amended to require that, when provided, they be used.

**Section 214.7 Definitions**

In the course of assimilating the written comments and statements given at the public hearing, it became apparent to FRA that additional terminology should be defined in the final rule in order to accurately reflect fall protection systems that are currently available in the market for use, or that are, in fact, routinely being used by general industry. Therefore, many of the terms defined in the final rule and listed below did not appear in the proposed rule. Unless otherwise noted, the definitions are taken from existing or proposed OSHA regulations that are based on current trade language.

**Anchorage****Proposed Rule**

This term was not defined in the proposed rule.

*Comments:* No comments received.

**Final rule**

The common terminology now employed to mean a lanyard, lifeline, and safety belt system for fall protection is a "personal fall arrest system." Anchorage is an integral component of a personal fall arrest system, and therefore is defined. FRA chose the definition utilized by OSHA in its regulations concerning fall protection, which reflects common trade usage. A particular worksite will determine the type of anchorage available, and so the definition allows for flexibility by stating only that it be a secure point of attachment for the other personal fall arrest system components.

**Body belt****Proposed Rule**

This term was not defined as such in the proposed rule, but is the functional

equivalent of "safety belt," which is defined in the proposal as a device, usually worn around the waist, which, by reason of its attachment to a lanyard and lifeline or a structure, will prevent a worker from falling.

*Comments:* Many commenters urged FRA to update this definition to reflect current terminology, including the addition of a deceleration device following lanyard and lifeline. Also, most commenters stated that use of body harnesses, rather than body belts, is now preferred practice. The body belt does not absorb stress forces in a fall as well as a harness can, and therefore, may cause serious internal injury to the wearer. According to commenters, many companies no longer manufacture belts because of this risk, and the construction industry will phase out their use in the near future. However, there are limited situations, climbing poles for instance, in which belts can be utilized safely.

**Final Rule**

FRA adopts the definition used by OSHA that reflects current trade language. Although the final rule permits the use of safety belts as part of a personal fall arrest system, use of harnesses is preferred.

**Body Harness****Proposed Rule**

This term was not defined in the proposed rule.

*Comments:* As stated above, all commenters urged FRA to include or mandate the use of body harnesses as a component of a personal fall arrest system. The harness distributes the fall arrest forces over the thighs, shoulders, pelvis, waist, and chest, and therefore decreases the likelihood of serious injury to the wearer. The majority of industry participants in this proceeding stated that harnesses are most often used.

**Final Rule**

FRA adopts the definition used by OSHA that reflects current trade terminology.

**Competent Person****Proposed Rule**

This term was not defined in the proposed rule.

*Comments:* No comments received.

**Final Rule**

Defining this term is necessary in light of paragraphs added to the final rule that require oversight or supervision by a person with knowledge, training, and relevant experience to adequately assess safety hazards. The definition contains these factors, and a

requirement that the individual also possess the authority to take prompt corrective measures, if necessary.

**Deceleration Device****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* No comments received.

**Final Rule**

This is defined as a device that dissipates fall forces during a fall arrest. It is often a type of lanyard or self-retracting lifeline.

**Equivalent****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* No comments received.

**Final Rule**

In order to give railroads and railroad contractors flexibility in choosing equipment not specified in the final rule, but perhaps more amenable to the railroad environment or more technically advanced, this term has been added to the rule at various locations. The railroad or railroad contractor bears the burden of demonstrating that the alternative device does not in any way decrease employee safety.

**Free fall****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* No comments received.

**Final Rule**

This term is significant in determining the amount of force applied to one who wears a personal fall arrest system. It is defined as the act of falling until the arresting forces begin to take effect.

**Free Fall Distance****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* No comments received.

**Final Rule**

As stated above, this phrase is important in determining the amount of force applied to a body before the fall arrest system begins to take effect. As defined, the distance does not include deceleration distance, or lifeline and lanyard elongation.



**Lanyard****Proposed Rule**

The proposed rule defined lanyard as a rope, suitable for supporting one person, that is attached to a safety belt or harness and a lifeline or other substantial object.

*Comments:* The AAR urged FRA to expand this definition to include cable, nylon webbing, or equivalent material in addition to "rope."

**Final Rule**

FRA incorporated the AAR's suggestion, and adopted the definition used by OSHA that reflects current trade language. The term is now defined as a flexible line of rope, wire rope or strap that secures a body belt or harness to a deceleration device, lifeline or anchorage.

**Lifeline****Proposed Rule**

Lifeline was defined as a rope, used for supporting one person, to which a lanyard or safety belt is attached.

*Comments:* The AAR objected to the clause which states that a lifeline is used for supporting one person, and claimed that it is common practice to attach more than one person to a lifeline.

**Final Rule**

The new definition states that a lifeline is a flexible line connected to an anchorage from which other portions of a fall arrest system are attached. More than one person may be attached to a lifeline, as common practice indicates, so long as the line complies with required standards.

**Personal Fall Arrest System****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* Commenters urged FRA to adopt this terminology for the safety belt, lanyard, lifeline fall protection system outlined in the proposed rule. It reflects common trade language.

**Final Rule**

The final rule defines this term as a system used to stop a fall from a working level, consisting of an anchorage, connectors, body harness or belt, lanyard, deceleration device, lifeline, or suitable combination of these.

**Railroad****Proposed Rule**

This definition was not contained in the proposed rule.

*Comments:* No comments received.

**Final Rule**

This definition is taken from section 202(e) of the Federal Railroad Safety Act of 1970, as amended by the RSIA, and includes all forms of non-highway transportation that run on rails or electro-magnetic guideways.

**Railroad Employee or Employee****Proposed Rule**

This term was defined as any employee of a railroad or railroad contractor responsible for the construction, inspection, testing, or maintenance of a bridge, whose duties affect the track, bridge structural members, operating mechanisms, water traffic controls, signal, communication, or train control systems integral to that bridge.

*Comments:* An individual commenter suggested that FRA change this term to 'bridge employee' to avoid confusion with other types of railroad employees.

**Final Rule**

The final rule defines "railroad employee" and "employee" together in this section, making the terms synonymous throughout part 214. FRA did not change the term to 'bridge worker' in the final rule to avoid any confusion with terms used by employers for labor categories that could conceivably limit the scope of this part. The definition is adopted as proposed.

**Railroad Bridge****Proposed Rule**

Railroad bridge was defined as a structure supporting one or more railroad tracks, above land or water, spanning at least 12 feet, and including the entire structure between the faces of the abutments.

*Comments:* No comments received.

**Final Rule**

Adopted as proposed.

**Self-Retracting Lifeline/Lanyard****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* This term was employed by industry, labor, and OSHA in general discussions of new components of a personal fall arrest system.

**Final Rule**

The definition adopts OSHA's language, which reflects common trade usage.

**Snap-Hook****Proposed Rule**

This term was not contained in the proposed rule.

*Comments:* This term was used by OSHA and industry commenters in general discussion of fall protection systems.

**Final Rule**

The final rule adopts OSHA's language, which reflects common trade usage.

**Section 214.101 Purpose and Scope****Proposed Rule**

Proposed as § 218.71, this section stated the purpose and scope of this subpart to be the prevention of accidents and casualties to railroad employees who work on railroad bridges. Railroads and railroad contractors may prescribe more stringent additional requirements. The proposed subpart would apply to all railroad and railroad contractor employees who work on railroad bridges.

Proposed paragraph (c) provided that employees conducting track repairs of a minor nature were exempt from requirements for safety nets, respiratory protection, and drowning protection.

Proposed paragraph (d) provided that safety belts, lifelines, lanyards and safety nets were not required where installation of these devices poses a greater threat than working without fall protection altogether.

Proposed paragraph (e) set the fall protection threshold. Employees working at heights of six feet or more must be protected with safety belts, lifelines, and lanyards. When working at heights of 25 feet or more, a safety net must be provided.

*Comments:* Several commenters found this section confusing and suggested organizational changes. Further discussion of these changes is found in the description of the final rule set forth below.

The AAR objected to the use of "minimum" safety rules in paragraph (b), stating that "mandatory" was more appropriate.

The AAR and Short Line Association urged FRA to expand the track repair exception found in proposed paragraph (c) to include signal repair, all minor inspection functions, emergencies such as fire fighting, driving piles, re-railing cars, unloading ballast, freeing animals, supervisory activities, and the use of fixed ladders. An individual commenter and Maryland's Division of Labor and Industry objected to the exception to



respiratory protection in this paragraph, stating that any exposure, no matter how brief, to certain contaminants can be hazardous.

We received no comments on proposed paragraph (d), which provided for an exception to the fall protection requirement where installation of fall protection systems poses a greater threat than working without fall protection.

Proposed paragraph (e) stirred much debate. Many commenters, including the AAR and OSHA, suggested that this paragraph be moved to its own section setting forth the threshold at which fall protection becomes necessary. Most of the discussion, however, centered on the imposition of the six-foot threshold. Because proposed paragraph (e) is now § 214.103(a) in the final rule, see discussion of those issues with that section set forth below.

#### Final Rule

FRA agrees that the scope provisions as proposed were not organized cohesively, and so this section now contains only statements of general application. A separate section, § 214.103, is now set aside for the height threshold and exceptions to fall protection requirements. For discussion of those issues, see § 214.103 below.

Paragraphs (a) and (b) of § 214.101 are adopted as proposed. Use of "minimum railroad safety rules" in paragraph (b) reflects traditional regulatory language. This terminology encourages railroads and their contractors to revise or improve these standards and employee safety as new technology and information become available, so long as this is done without contradicting the standards in this rule.

Paragraph (c) as adopted in the final rule is limited to the general statement of application found in the proposal, and to that extent, is identical to the application statement in § 218.71(c) of the proposed rule. The exception for minor track repairs that followed this language in the proposed rule has now been moved to § 214.103(d) and is discussed with that section below.

Paragraph (d) as set forth in § 214.101 of the final rule did not appear in the language of the proposed rule. However, this subsection incorporates that portion of the preamble of the NPRM which discussed the complementary jurisdiction of FRA and OSHA with respect to occupational hazards in the railroad workplace. Paragraph (d) states that any working conditions involving the protection of railroad employees working on railroad bridges not within the subject matter addressed by the regulations found in chapter II of title 49

of the Code of Federal Regulations (*i.e.*, all railroad safety regulations), including respiratory protection, hazard communications, hearing protection, welding and lead exposure standards, is governed by OSHA's regulations. This language reiterates the jurisdictional delineations that were set forth in FRA's 1978 Policy Statement (42 FR 22184), and provides additional clarity for employees and railroads who must comply with Federal regulations. In written comments, OSHA urged FRA to affirmatively make this statement, and FRA believes that doing so will eliminate any remaining confusion with respect to subject matters that are not explicitly addressed in this final rule.

#### Section 214.103 Fall Protection Generally

##### Proposed Rule

This section, formally paragraph (e) of § 218.71, stated that when employees worked six feet or more above the ground, they must be protected by the use of safety belts, lanyards, and lifelines.

**Comments:** This proposal created significant controversy among the industry representatives who participated in the proceeding. The BMW and OSHA concurred with a height threshold of six feet.

FRA adopted OSHA's current construction threshold of six feet in the proposed rule because the duties railroad employees perform on bridges are in fact typical construction duties: maintaining, repairing, painting, and inspecting the bridge structure. However, the AAR, the Short Line Association, and their individual members strongly urged FRA to move to a twenty-foot threshold. A major bridge restoration company suggested adoption of a fifteen-foot threshold.

FRA solicited information from these participants concerning the height thresholds they require in internal operating rules, and any relevant injury data they possess for employee falls from railroad bridges. Of the AAR members who provided information, three use a threshold of 25 feet, two use 20 feet, two use 10 feet, one uses 6 feet, and four do not specify a threshold. Of the Short Line Association members, approximately 50 per cent hire contractors to do any bridge construction work, 20 per cent set the threshold at 20 feet or more, 20 per cent set the threshold at 20 feet, one member at 15 feet, one at 10 feet, and two at 6 feet. Osmose, a bridge restoration company, uses fifteen feet. As stated by a Canadian participant, Canada imposes a ten-foot standard currently, but may

be amending the threshold to six or eight feet in the near future.

The BMW and the Short Line Association had no relevant injury data to submit. OSHA indicated that deaths have been reported in falls from heights of eight feet. The AAR submitted the following casualty information: (1) 10 incidents in falls from heights less than 6 feet with 67 lost man-days per incident, 2 + million man-hours worked at this height, 318 lost man-days per million man-hours, and .95 incidents per 200,000 man-hours; (2) 30 incidents in falls from heights between 6 and 19 feet with 69 lost man-days per incident, 14 + million man-hours worked at this height, 132 lost man-days per million man-hours, and .38 incidents per 200,000 man-hours; and (3) 15 incidents in falls from heights over 19 feet with 103 lost man-days per incident, 6 + million man-hours worked at this height, 223 lost man-days per million man-hours, and .43 incidents per 200,000 man-hours. AAR notes that the figures for lost man-days per million man-days and number of incidents per 200,000 man-hours are slightly overstated because 13 railroads reported in some categories, and 14 in others.

FRA's casualty data for injuries are not delineated by distance of fall. However, our fatality data are: In seven of eight employee fatality investigations of falls from railroad bridges during the period of January, 1981 through December, 1990, the lowest height at which death occurred was 10 feet, and the highest 112 feet. The average for the seven fatalities is 37 feet. (Distance of fall was not noted in the eighth investigation.)

OSHA based the existing six-foot construction standard on studies that indicated that the 90th percentile man could do a complete body inversion and land on his head, likely to result in serious injury, from a height of six feet. Also, six feet was the current ANSI standard when this threshold was chosen.

While the AAR points to examples where OSHA has established a height threshold of 20 or 25 feet, each of those instances represents exceptions to the general rule where special circumstances are present. For instance, an exception is given where employees work on low-pitched roofs. Also, where employees work on fixed ladder stands that are not likely to shift, a higher threshold is permitted. In each of these instances, the chance of falling is diminished by the structure of the work site.

Several industry commenters also suggested that the force of the fall arrest system may cause greater injury than a



fall of six feet. However, there is not data available to confirm or deny this proposition.

Finally, all industry representatives asserted that the cost of complying with a six-foot threshold would be prohibitive. Implied in this assertion is the fact that only one of AAR's members and two Short Line Association members are currently in compliance with applicable OSHA regulations. (For further discussion of this issue, please see discussion of personal protection equipment, §§ 214.111 through 214.115 below.)

#### Final Rule

Section 214.103(a) of the final rule states that fall protection, either a personal fall arrest system or safety nets, must be provided and used where employees are working twelve or more feet above the ground or water surface. Three exceptions (formerly § 218.71 (c) and (d), and § 218.72) to this requirement follow in paragraphs (b) through (d).

FRA believes that the twelve-foot standard best provides necessary fall protection for railroad bridge employees. In analyzing the practical application of a six-foot standard in the railroad bridge environment, FRA determined that it would inhibit the movement of the worker to the point that many may choose not to wear the device at that height, and it would in many instances allow an employee to hit the ground or water surface below before the protective device could stop the fall. Unlike traditional building construction sites where the point of attachment for a fall arrest system is overhead, the configuration of most railroad bridges will require that the point of attachment be at foot-level or will require installation of superstructure at considerable risk to those performing that work. Most railroad bridges simply do not have secure structures above the rails that will support such attachment. A standard six-foot lanyard attached at the rail on one end and to the body harness on the other will allow an employee who is standing and walking very little movement while working on the bridge. To the extent work is rendered impractical or significant discomfort or annoyance is caused to the wearer, compliance will likely suffer. Any habit of noncompliance may carry over to work at greater heights.

When a standard fall arrest system is engaged, the length of an extended lanyard and deceleration device totals approximately 9 1/2 feet. If the surface below is not farther from the working surface than 9 1/2 feet, and if the

protective device is attached at the rail on the side of the bridge being worked on, an employee will hit the ground or water surface below before the system begins to arrest the fall. A possible alternative to this scenario is to attach the system to the opposite side of the bridge being worked on, which would take up approximately four feet of the lanyard length. However, this would greatly restrict the movement of the employee and would introduce tripping hazards that do not otherwise exist. Given the low likelihood of serious injury from short falls and the sharply increased risk of injury from tripping over lanyards strung along a bridge surface, FRA believes employees are safer on railroad bridges at low heights without personal fall arrest systems.

Therefore, given that the length of the fully engaged fall arrest system itself is close to ten feet, and that the length of the legs and torso that will hang below the body harness must also be considered, FRA believes that a twelve-foot standard provides the safest and most practical height threshold for fall protection devices.

Safety nets are an alternative to the body harness and lanyard system, but are nearly impossible to install effectively at a height of less than twelve feet, given the distance a body will deflect the net upon contact.

Also, paragraph (a) now permits selection of the appropriate fall protection, either a fall arrest system or safety nets, by the railroad or railroad contractor. In the proposed rule, personal fall arrest devices were required at six feet and safety nets were mandated at 25 feet. Many industry commenters asserted that net installation is unreasonably expensive, time-consuming, dangerous, and in some cases, impossible due to railroad bridge configurations. Also, the commenters claimed that safety nets can decrease employee safety by giving those who work above them a false sense of security, which in turn produces dangerous behavior. The railroads and bridge restoration company stated that they rely exclusively on personal fall arrest systems.

The BMWF also objected to the safety net provision as proposed. They felt that the 25-foot threshold should be strengthened to ten feet.

In recent rulemaking proceedings, OSHA has moved to an option approach for fall protection systems. That agency's most current proposals set a height threshold, establish standards and criteria for nets and fall arrest devices, and permit the employer to choose the system that can best

accommodate environmental and safety concerns. (55 FR 13360, April 10, 1990.)

FRA believes that this approach is particularly advantageous in the railroad environment. Where railroad bridge configurations make nets impossible, or where the exposure to risk is of minimal duration, the personal fall arrest system can be used. However, where a major renovation that may go on for months is undertaken, nets can be chosen. This change in the final rule also responds to the safety concerns raised by the BMWF concerning the net height threshold: if chosen, nets must now be installed at the same height threshold as personal fall arrest devices.

Paragraph (b) of this section states that the fall protection requirements shall not apply if installation of the system poses greater risk than performing work without fall protection. The railroad or contractor has the burden of showing this in any action brought by FRA to enforce the fall protection requirements. In other words, once FRA had demonstrated the absence of fall protection, the burden would shift to the railroad to justify its absence by demonstrating that it properly determined that installation posed a greater risk. This section (formerly § 218.71(d) in the proposed rule) received no comments and is adopted substantively as proposed.

Paragraph (c) of the final rule concerning walkways and railings contains the language of former § 218.72 in the proposed rule, and has been adopted with changes. This paragraph stated that fall protection was not required where stable walkways and railings are present, so long as employees do not work beyond the railings, over the side of the bridge, or where large holes exist. In written comments, OSHA noted that the provision as written did not address protection for workers who are on ladders or other elevation devices stationed on the walkways. OSHA asserted that because those employees, once elevated, are not restrained or protected by walkways and railings, other means of fall protection should be provided. FRA concurs with this assessment and has added that restriction to the fall protection exception.

Also, the final rule requires the presence of toeboards, and states that the walkways must be of sufficient height, width, and strength to prevent an employee fall. FRA believes that this new language provides pertinent guidance to railroads, contractors, and employees as to what constitutes "secure" walkways and railings.



Walkways and railings that meet the standards set forth in the American Railway Engineering Association's Manual for Railway Engineering will satisfy this subsection.

Paragraph (d) of the final rule contains the minor repair exception that was part of § 218.71(c) in the proposed rule. This exception has been adopted with changes. The word "track" has been removed, the word "inspections" has been added, the words "or in close proximity to" have been removed, the word "outside" has been added before "rails", the term "exclusively" has been inserted before "between the outside rails," and the exception no longer applies to respiratory protection. Substantively, the paragraph now permits an exception to fall protection when employees are performing minor repairs in any discipline, or are doing inspections, so long as those activities can be accomplished by working exclusively between the outside rails of the bridge.

FRA added the word "outside" in response to a commenter who questioned whether an employee working between two lines of track on a multiple-track bridge would come within this exception. As now written, such an employee will not be required to have fall protection so long as there are no gaps in the area between the rails through which a person could fall.

FRA added the term "exclusively" to further define those activities that will be categorized as "minor," and therefore truly merit being accomplished without fall protection of any sort. Given the obvious risks inherent in working without fall protection, this exception will be enforced as literally and narrowly as possible. Therefore, if an activity involves movement requiring one to stand or travel with one or more weight-bearing portions of the body beyond the boundaries of the rails, no matter how slight the duration, fall protection must be provided. Clearly, replacing all or a large percentage of the ties on the bridge will not constitute repairs of a minor nature that can be completed exclusively between the rails. However, walking the length of the bridge, between the rails, to visually inspect the ties would come within paragraph (d) of § 214.103.

The expansive language that the AAR urged FRA to insert in this exception, including fire-fighting, re-railing cars, unloading ballast, pile driving and freeing animals, has not been adopted. Many of these functions may, in fact, fall within the exception set forth in paragraph (b) of this section. FRA believes that those determinations should be made on a case-by-case basis

by the railroad or railroad contractor, and should not be excepted from coverage in a sweeping fashion.

Because FRA has determined that OSHA is the appropriate Federal agency to regulate respiratory protection for railroad employees, this final rule does not include respiratory standards. (See Respiratory Protection discussed below.) Therefore, this paragraph no longer contains an exception to respiratory protection when employees are doing minor repairs or inspections. Also, FRA concurs with those commenters who stated that even a brief exposure to certain contaminants can be hazardous, and therefore, respiratory protection should be required whenever such exposure exists.

#### *Section 214.105 Fall Protection Systems Standards and Practices*

##### *Proposed Rule*

This section combines what was § 218.73 (Safety belts, lifelines, and lanyard) and § 218.74 (Safety nets) in the proposed rule. Proposed § 218.73 provided that lifelines, safety belts, and lanyards be used only for employee safeguarding, and that any device subjected to full impact load be removed from service. Also, lifelines were to be secured to an anchorage above the point of attachment and be capable of supporting a dead weight of 5,400 pounds. Lanyards were to be of ½ inch nylon, or equivalent, permit a fall of no greater than six feet, and be capable of holding 5,400 pounds. All hardware was to be drop forged or pressed steel and possess smooth surfaces. All hardware would be capable of withstanding a tensile loading of 4,000 pounds. Proposed § 218.74 provided that nets must be installed where the workplace is 25 feet above the ground or water surface, and that work would not begin until the net was in place. The net would extend eight feet beyond the edge of the work surface and be hung so that impact would not cause the falling body to contact surfaces below the net. The remaining paragraphs set performance standards and required that forged steel safety hooks be used.

*Comments:* Industry representatives, OSHA, and Maryland's Division of Labor and Industry submitted comments on these issues. Generally, they recommended that FRA move to the more current "fall arrest system" terminology and incorporate recent performance standards for those devices. In particular, OSHA and Sinco Products, Inc. (a fall protection system manufacturing and installation company) outlined new ANSI standards for safety nets, and performance

language for fall arrest system devices. OSHA and an individual commenter suggested that any device subjected to a full impact load be retained if the fall is minor (two feet, for instance), and a competent individual can certify that no damage that would reduce the component's strength occurred. Another individual urged that these devices be discarded as proposed because internal tearing of component parts could diminish load strength, but would not be a visible defect.

##### *Final Rule*

FRA believes that the description of fall protection devices in the final rule should reflect certain suggested changes in order to provide for adequate employee safety. The standards set forth in this section now reflect OSHA's most current performance standards. This section has been reorganized as follows: Paragraph (a) sets forth general requirements for the use, maintenance and repair of all fall protection devices, and requires certain operating practices; paragraph (b) sets performance standards and use guidelines for personal fall arrest systems; and paragraph (c) sets standards and use guidelines for safety nets.

Paragraph (a) requires that these systems be used only for fall protection, that they be protected from deterioration, that they be inspected prior to each use, that defective devices be discarded, and that employees be instructed on proper use and storage, and that employees be advised of any changes in the system. The railroad or contractor must provide for prompt rescue of employees who have fallen. All connectors must be corrosion-resistant and have smooth edges to prevent damage to any other components in the system. All anchorages must be capable of supporting at least 5,000 pounds and be used under the supervision of a qualified individual. The program must have a safety factor of at least two. Finally, where devices have been subjected to full impact loading, the device may be retained if the impact was slight (the fall was no more than two or three feet), and a competent person has determined that no damage occurred to the device.

Paragraph (b) sets forth performance standards for the components of the fall arrest system. Lanyards and lifelines that hold one employee must withstand a load of 5,000 pounds. Self-retracting lifelines and lanyards that limit free fall distance to two feet must withstand a tensile load of 3,000 pounds and those that do not limit the free fall distance must be capable of 5,000 pounds applied



force. Horizontal lifelines shall be installed under the supervision of a competent person, and lifelines may not be made of natural fiber rope. When using a body belt, the system shall limit the arresting force on the employee to 900 pounds. When using a body harness, the system shall limit the arresting force to 1,800 pounds. The system shall be arranged to limit free fall to six feet, to withstand twice the impact energy of free falling six feet, shall bring an employee to a complete stop and limit maximum deceleration distance to 3.5 feet. When vertical lifelines are used, there shall be a separate line for each employee. Dee-rings and snap-hooks shall be capable of sustaining 5,000 pounds and withstand 3,600 pounds without cracking or deformation. Snap-hooks cannot be connected to each other, shall be compatible with the member they are connected to, and cannot be placed directly to webbing or rope, each other or to a horizontal lifeline.

Paragraph (c) sets forth the new standards for safety net systems. Safety nets shall be installed as close to the work surface as possible, but the distance between the net and work surface cannot exceed 30 feet. If installation is beyond 30 feet, a personal fall arrest system is also required. Installation shall be accomplished so that any fall to the net is unobstructed, and that there will be no contact with surfaces below the net. All nets must be drop-tested, unless the railroad or contractor can demonstrate that the test is impossible. Such a claim must be certified by a competent person. In order to allow for the fact that objects tend to drift horizontally while falling vertically, the net must extend outward from the edge of the work surface according to the distance of the vertical drop from the workplace to the net. Nets must be inspected once a week for deterioration, and after each occurrence that could reduce the safety of the net. Any objects that fall into the net must be removed by the beginning of the next work shift, if not sooner. The maximum breaking strength of the net border shall be 5,000 pounds and connections between net panels shall be as strong as integral net parts.

#### *Section 214.107 Working Over or Adjacent to Water*

##### **Proposed Rule**

The proposed rule required the use of life preservers where employees work over or near water in excess of three feet deep, or where the danger of drowning exists. The proposal also required that the preservers be

inspected prior to and after each use, and that any defective units be removed permanently from service. Ring bouys with at least 90 feet of line should be present and ready for rescue operations, and at least one lifesaving skiff made available.

*Comments:* The AAR, the Short Line Association, OSHA, and individuals submitted comments concerning protection from drowning. The AAR urged FRA to move the water depth threshold to at least four feet, reasoning that most or all bridge workers can stand in water four feet deep with no threat of drowning. If the particular body of water contains swift currents or dangerous rock formations, life preservers will be provided under the "danger of drowning" portion of paragraph (a). Therefore, the two clauses together would provide adequate protection.

OSHA and individual commenters urged FRA to drop the life preserver requirement altogether where employees are provided fall protection through a personal fall arrest system or safety net. They argue that requiring both would be duplicative, may decrease safety, and may be physically impossible. For instance, where employees work twelve feet above water and use fall protection as required, the chance of falling into water at all is remote, at best. Requiring a life preserver over a body harness would add no protection from drowning, may interfere with the connection at the place of attachment on the harness, or may make fastening the preserver over the harness impossible.

FRA received no comments concerning paragraph (b).

The AAR urged FRA to clarify when ring bouys are required by paragraph (c). The paragraph, as proposed, set forth only length and distance between bouys.

FRA received many comments regarding proposed paragraph (d), which required a lifesaving skiff where life vests are required. The AAR, Short Line Association, and individuals stated that this provision should be left to the discretion of the railroad or contractor. They argued that requiring the transport of a boat to remote regions is unreasonably burdensome. OSHA urged that FRA insert a provision in this paragraph that would require a daily safety assessment of the water current conditions, and if determined necessary provide that the craft be manned. Other commenters suggested that we clarify the term "skiff."

##### **Final Rule**

FRA has made several changes to this section as a result of the comments

received. First, the term "near" has been replaced by "adjacent to." FRA believes that this amendment will prevent any questions of clarification as to what constitutes "near" water. Use of the term adjacent, defined as "to share a common boundary, abut or adjoin," limits the scope of this section to only those situations where the danger of drowning truly exists.

FRA concurs with the AAR's water depth threshold reasoning with respect to paragraph (a), and the final rule now requires the use of a life preserver when working adjacent to water with a depth of four feet or more, or where the danger of drowning exists. Also, FRA agrees with the amendments OSHA urged concerning the difficulties of requiring both fall protection and life preservers. Paragraph (a) of the final rule now does not require the use of life preservers where employees are being protected by a personal fall arrest system or safety nets that meet the requirements of this subpart.

Paragraph (b) of the final rule provides an exception to the life preserver requirement when an employee is conducting an inspection of the structures below or above the bridge deck. FRA concurs with a commenter who stated that the bulk of a life preserver can inhibit movement and restrict visibility, particularly when climbing poles. Therefore, an employee will not be required to use and the railroad or contractor will not be required to provide life preservers when a worker is conducting inspections, particularly on poles above or beneath the bridge deck, in which use of the life preserver can actually decrease employee safety.

Paragraph (c) of the final rule (formerly § 218.75(b)) has been amended to require inspections of the flotation devices only prior to use. So long as these inspections are done thoroughly, FRA can find no reason to also require an inspection after use of the devices.

Paragraph (d) of the final rule (formerly § 218.75(c)) has been amended and now specifies that ring bouys are required where the use of life preservers is required, i.e. when employees are over or adjacent to water with a depth of four feet or more, or where there is a danger of drowning, and where they are not otherwise protected by a personal fall arrest system or safety net.

Paragraph (e) of the final rule (formerly § 218.75(d)) states that a skiff, inflatable boat, or equivalent device shall be available where life vests are required. This permits railroads or contractors to choose the type of device utilized according to the terrain that



must be travelled, as well as the type of water present. This discretion can therefore be used to enhance safety concerns during the haul, and at the work site. Also, the final rule now requires that where environmental conditions, including water and air temperature, wind, precipitation, water speed, and water bed terrain, merit additional protection, the life boat will be manned. This determination shall be made by a competent individual present at the work site.

#### Section 214.109 Scaffolding.

##### Proposed Rule

Proposed § 218.78 addressed requirements for scaffolding. The section was moved to this location in the final rule so that the personal protective equipment sections followed uninterrupted. Proposed paragraph (a) set forth minimum grade standards for framing and guardrails. Proposed paragraph (b) provided for guardrail size and maximum load requirements, that they not be moved or altered while occupied, and that an access ladder or equivalent device be provided. Proposed paragraph (c) set similar standards for mobile ladder stands and scaffolds.

*Comments:* OSHA, Maryland's Division of Industry and Labor, and Osmose Wood Preserving, Inc. (a bridge restoration company) submitted comments on this proposed section.

OSHA stated that the language in paragraph (a) requiring 1,500-fiber-grade lumber is outdated. They prefer a performance-oriented standard, which sets a four-to-one ratio of maximum intended load to failure, that is more likely to guaranty safety. Also, OSHA stated that the term "stationary" scaffolds used in proposed paragraph (b) is not a recognized scaffold industry term and suggested that it be deleted. Finally, OSHA recommended that FRA adopt performance-oriented standards of 200 pounds for guardrails and 150 pounds for midrails.

Osmose Wood Preserving urged FRA to increase the midrail sizes listed in proposed paragraphs (b)(1) and (c)(6) for added strength from one-by-four inch lumber to two-by-four inch lumber. Also, Osmose stated that mobile scaffolds should be exempted from proposed paragraph (b)(3), which prohibits the movement of scaffolds while they are occupied. As Osmose points out, mobile scaffolds are designed to move vertically while occupied and so this section should not apply.

Maryland's Division of Labor and Industry stated that our proposed scaffolding regulations were incomplete as compared to existing OSHA

regulations, and should be amended generally.

An individual commenter and OSHA also suggested that a trained or knowledgeable individual oversee scaffold design, construction, and repair.

##### Final Rule

FRA concurs with OSHA's comments concerning performance-oriented standards for scaffolds, guardrails, and midrails. Their most recent proposals with suggested weight thresholds have been adopted as recommended. These standards, which are functionally equivalent to the traditional size-oriented standards previously used, serve as a more accurate measure of scaffold and scaffold-component strength. By incorporating these standards, Osmose's suggestions concerning midrail size have also been adopted. Also, the term "stationary" has been deleted as a modifier of scaffold in the final rule to reflect trade usage language.

FRA concurs with Osmose Wood Preserving concerning the prohibition on movement of mobile scaffolds, and the final rule reflects this exemption in paragraph (b).

FRA agrees that scaffold design, construction, and repair should be undertaken by an individual with experience, knowledge, or advanced training in order to prevent safety hazards. Therefore, paragraph (e) of the final rule incorporates this concern.

FRA made every attempt to propose comprehensive scaffold standards. However, the final rule, although functionally similar to our proposal, has been reorganized to reflect the comments of OSHA, Maryland's Division of Labor, and Osmose Wood Preserving, Inc.

Paragraph (a) mandates that scaffolds be constructed and maintained in a safe condition, sets forth load limits and top edge heights.

Paragraph (b) (formerly paragraph (b)(3)) is adopted as proposed, with the additional exemption for mobile scaffolds.

Paragraph (c) (formerly paragraph (b)(4)) is adopted as proposed.

Paragraph (d) (formerly paragraph (c)(3)) is adopted as proposed.

Paragraph (e) requires that scaffolds be designed, constructed, and repaired by competent individuals, and describes the knowledge or experience those individuals must possess.

Paragraph (f) (formerly paragraph (c)) is adopted as proposed, adding the new performance standards for scaffolds, guardrails, and midrails.

#### Section 214.111 Personal Protective Equipment

##### Proposed Rule

Listed as § 218.79 in the proposed rule, this section proposed that railroads and their contractors require employees to wear appropriate personal protective equipment where there is an exposure to risk of injury.

*Comments:* The Short Line Association and the AAR expressed opposition to this requirement, as well as to those sections that cover specific devices for head, foot, eye, and face protection. The AAR stated that FRA did not present data which supports a Federal mandate for personal protective equipment. The AAR asserted that most railroad operating rules require such equipment, and therefore, the railroad labor force is amply protected by these internal rules. In addition, the AAR questioned why FRA does not also require these personal protective devices for railroad employees who do similar types of construction work in yards and shops, and postulated that it is because there is no real need for such equipment. Finally, the AAR stated that the expense of personal protective equipment is a traditional subject of collective bargaining and therefore, one that FRA should not interfere with or oversee. The Short Line Association echoed these objections, and declared that the cost of compliance would be unreasonably burdensome to most short line railroads.

The Brotherhood of Maintenance of Way Employees and OSHA supported this general duty section, as well as those sections providing for specific protective devices. In this vein, both OSHA and the BMWE suggested that FRA insert an additional section in the final rule to address hearing protection. FRA fully considered adding a section to the final rule that would have mandated adequate hearing protection for bridge workers. FRA concurs that bridge workers operating sand blasters, drills, jackhammers, and other forms of power equipment should be provided appropriate hearing protection, but believes that this is an area requiring OSHA's health-related expertise. Pertinent OSHA regulations exist and shall continue to govern these hazards. Also, because such a proposal was not set forth in the NPRM and all interested parties were not afforded the required opportunity to comment, FRA cannot go forward in the final rule with hearing protection regulations.



## Final Rule

FRA believes that requiring personal protective equipment is critical to the success of any safety program for railroad bridge workers. Injury data compiled by FRA from January, 1980, through March, 1991 for bridge and building gang foremen, carpenters, ironworkers, and painters indicate that the following casualties have occurred: 9 fatalities, 20 concussions, 205 fractures to the legs or feet, 639 sprains to the legs or feet, 424 lacerations to the head or face, 259 lacerations to the legs or feet, 102 puncture wounds to the legs or feet, 14 puncture wounds to the head or face, 71 burns to the head or face, 601 instances of foreign objects in the eye, 114 contusions to the head or face, and 498 contusions to the legs or feet. While these figures include building workers as well as bridge employees, they nonetheless demonstrate a need for personal protective equipment for railroad bridge workers.

The AAR's response to our proposal for personal protective equipment declares that "most railroads" require such equipment "when appropriate." While we understand the industry's intent to be to provide sufficient protection for railroad employees, FRA believes that a national standard applicable to all railroads will more adequately respond to and reduce the injury figures listed above.

In questioning why FRA does not also require personal protective equipment for those railroad employees who work in rail yards and shops, the AAR overlooks the limited scope of this rule. Our statutory mandate in this proceeding is to determine what regulations may be necessary to address the safety hazards to railroad bridge workers. The standards and requirements promulgated in this proceeding are limited to such matters. FRA certainly does not intend to imply that such protections should not also be afforded yard and shop employees, but in fact, OSHA's regulations currently provide adequate protection in those areas.

Also, this response by the AAR implies that current applicable OSHA regulations concerning personal protective equipment are not being followed or enforced. As the preamble of the NPRM in this matter states, OSHA regulations with respect to personal protective equipment, as well as in other areas, remain in effect until promulgation of this final rule supplants those regulations with regard to certain subject matters. The plain language of the 1978 Policy Statement, which

delineates FRA and OSHA authority, so states:

OSHA regulations concerning personal protective equipment apply according to their terms, except to the extent the general requirements might be read to require protective equipment responsive to hazards growing out of railroad operations.

(43 FR 10583, 10588). Bridge workers conducting maintenance, repair, and painting tasks on railroad bridges function as traditional construction employees, and are not involved in work unique to the railroad that falls into the narrow "railroad operations" category. Also, as the Policy Statement clearly states, OSHA regulations concerning traditional construction work (defined in the Policy Statement as construction, alteration, and/or repair, including painting and decorating) shall apply (43 FR 10589).<sup>1</sup> Therefore, in order to assure that railroad bridge workers retain protection at least as good as what they protection than they currently have, FRA may pursue one of two options: Promulgate regulations in this Subpart mandating personal protective equipment, or leave this area in the hands of OSHA. FRA has determined that promulgating regulations on certain specific subject matters within the area of personal protection is the most efficient course to take, since use of the personal protective equipment addressed in this final rule is a reasonably straightforward safety issue that can be addressed during normal FRA safety inspections. We have tracked the OSHA language in the final rule so that the level of protection afforded railroad employees does not shift. Of course, as § 214.101(d) of the final rule provides, OSHA rules on subject matters related to the safety of railroad bridge workers but not addressed in this rule remain in effect.

In requiring personal protective equipment, FRA is not addressing the issue of who pays for it. FRA understands that payment for certain items of personal protective equipment has long been a collective bargaining issue, and FRA does not change that.

<sup>1</sup> The AAR cites *Templeton v. Chicago and North Western Transportation Co.*, No. 1-90-0312 (Ill. App. Ct. March 15, 1991) in support of its claim that pertinent OSHA regulations do not apply to railroad bridge workers. In that case, the Appellate Court of Illinois viewed issuance of the Policy Statement as an exercise of jurisdiction by FRA over all matters affecting railroad employees. This sweeping interpretation of the Policy Statement overlooks the plain language and intent of the statement, which clearly discerns occupational hazards that are more appropriately regulated by OSHA: those conditions that do not require FRA's specialized expertise. With respect, the Court was plainly wrong: FRA has not exercised jurisdiction over all matters affecting railroad employees either through the Policy Statement or otherwise.

Former § 218.79 of the proposed rule is therefore adopted as proposed in § 218.111 of the final rule.

## Section 214.113 Head Protection

## Proposed Rule

The proposed rule provided for protective helmets when a risk of injury from falling objects, impact, shock or burns existed.

*Comments:* For discussion of comments questioning the need to regulate head equipment, see § 214.111 above.

OSHA and individual commenters noted that our proposal did not contain the most recent American National Standards Institute (ANSI) standard.

## Final Rule

The final rule cites the relevant ANSI standard currently effective. As those standards change, FRA will make technical amendments to incorporate the changes, as necessary. The final rule also requires that the equipment, when provided be used.

## Section 214.115 Foot Protection

## Proposed Rule

The proposed rule provided that footwear and rubber protective equipment must conform to the national consensus standards.

*Comments:* For discussion of comments questioning the need for protective devices, see § 214.111 above.

OSHA and individual commenters noted that the proposed section did not contain the most recent ANSI standard for footwear.

## Final Rule

The final rule is adopted substantively as proposed in paragraph (b), but cites the currently effective ANSI standard. In addition, paragraph (a) of the final rule now mandates that the railroad or railroad contractor require the use of shoes meeting this standard. Based on the injury data listed above which indicates prevalent foot injuries for bridge workers, FRA has concluded that the safety interests of bridge workers will be better served by requiring safety-toe footwear.

## Section 214.117 Eye and Face Protection

## Proposed Rule

The proposed section mandated eye and face protection when employees face exposure to injury from physical, chemical, or radiant agents. The equipment would have to meet ANSI standards, be kept clean and in good repair, and would be altered or



accommodated as necessary for employees with corrective lenses.

*Comments:* For discussion questioning the need for such equipment, see § 214.111 above.

OSHA and individual commenters noted that the most recent ANSI standard was not contained in the proposal.

#### Final Rule

The final rule is adopted substantively without change, but cites the currently effective ANSI standard. The rule also requires that the equipment, when provided, be used.

#### Respiratory Protection

##### Proposed Rule

The proposed rule required that employees be trained on the use and limitations of respirators when such protection is necessary. Also, the proposal mandated that facial hair must be removed where it interferes with a tight fit, that the appropriate device be chosen according to contaminant exposure, and that the equipment be inspected and cleaned regularly.

*Comments:* FRA received comments from the BMWE, the AAR, the Short Line Association, OSHA, Maryland's Division of Labor and Industry, and individuals with respect to respiratory protection.

The BMWE, OSHA, Maryland's Division of Labor and Industry, and individual commenters strongly urged FRA to reformulate this section to include the components of the standard industrial respiratory program, as listed in OSHA's general industry standards. Those include: A written program outlining the selection and use of respirators, surveillance of work area conditions, effectiveness evaluations, determinations that employees are physically able to use the equipment, selection of respirators according to the ANSI standards, fitting practice demonstrations, random inspections, equipment inspections prior to each use, and storage and repair guidelines. These commenters asserted that by omitting these portions, or shortening them in some instances, employees would be put at serious risk. Additionally, they stated that respirator selection and fit are critical elements of a successful program, and therefore must be outlined in detail.

The AAR and Short Line Association objected to this requirement, stating that the proposal is not necessary in most circumstances, and as written would require respirator use in most metropolitan cities. The AAR suggested that FRA mandate respirator use only when employees are engaged in sand

blasting, spray painting, or using torches on lead paint.

#### Final Rule

In light of the complexity of respirator use and maintenance, and the dire consequences that may result from an inadequate regulatory and enforcement program, FRA has determined that respiratory protection is best governed by existing OSHA regulations.

FRA simply does not possess the expertise or personnel to adequately investigate proper fit testing, air sampling, and respirator choice according to contaminate that is required in a comprehensive respiratory protection program. OSHA is currently updating the existing standards that FRA proposed in the NPRM, so that a new and expanded rulemaking would be necessary in the near future to adequately incorporate all of the information that is only now becoming available.

Therefore, this final rule does not contain respiratory protection requirements. Existing OSHA regulations governing fit, use, maintenance, and repair of respirators and related training will apply to railroad employees.

#### Regulatory Impact

##### E.O. 12291 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures and is considered to be nonmajor under Executive Order 12291. It is, however, considered to be significant under DOT policies and procedures (44 FR 11304) because it would initiate a substantial regulatory program.

Consequently, FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of the rule. It may be inspected and copied at room 8209, 400 Seventh Street, SW., Washington, DC 20590. Copies may also be obtained by submitting a written request to the FRA Docket Clerk at the above address.

This rule represents a simple transfer of regulatory jurisdiction from one Federal agency (OSHA) to another (FRA), with minor modifications appropriate to the context of railroad bridges. Based on the comments submitted, some railroads have apparently not been in full compliance with the OSHA rules, and may now incur some increased out-of-pocket expenditures. The specific extent of these expenditures cannot be determined. However, since the railroad industry is subject to the OSHA

requirements, any such expenditures are not a cost of this rule. FRA will expend about \$264,000 (the equivalent of four employee years) for its additional enforcement responsibility. Benefits will derive from the clarity of the present final rule and increased enforcement. While the extent of actual benefits realized again cannot be quantified at this time, the agency believes that the benefits of the rule will outweigh its costs.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. In reviewing the economic impact of the rule, FRA concluded that it will have a minimal economic impact on a minor number of small entities. There is no direct or indirect economic impact on small units of government, businesses, or other organizations. Therefore, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act. State rail agencies remain free to participate in the administration of FRA's rules but are not required to do so.

#### Paperwork Reduction Act

This rule has an information collection requirement in § 214.105(c) stating that when a drop test is not feasible, a designated person must certify that the net and its installation are in compliance with the provisions of the Bridge Worker Safety Rules. FRA is submitting this information collection requirement to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980. The public reporting burden for this collection of information is estimated to average two minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Gloria D. Swanson, Office of Safety, RRS-21, Federal Railroad Administration, 400 Seventh Street, SW., Washington, DC 20590; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Desk Officer for FRA (OMB No. 2130-New), 726 Jackson Place, NW., Washington, DC 20503. Copies of any such comments should also be submitted to the docket



of this rulemaking at the address provided above.

#### *Environmental Impact*

FRA has evaluated these regulations in accordance with its procedures for ensuring full consideration of the environmental impact of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) other environmental statutes, Executive Orders, and DOT Order 5610.1c. These regulations meet criteria establishing this as a non-major action for environmental purposes.

#### *Federalism Implications*

This rule will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

#### **List of Subjects in 49 CFR Part 214**

Bridges, Occupational safety and health, Penalties, Railroad operating practices, Railroad safety, Reporting and recordkeeping requirements.

#### **The Rule**

In consideration of the foregoing, FRA adds part 214, title 49, Code of Federal Regulations to read as follows:

### **PART 214—RAILROAD WORKPLACE SAFETY**

#### **Subpart A—General**

- 214.1 Purpose and scope.
- 214.3 Application.
- 214.5 Responsibility for compliance.
- 214.7 Definitions.

#### **Subpart B—Bridge Worker Safety Standards**

- 214.101 Purpose and scope.
- 214.103 Fall protection, generally.
- 214.105 Fall protection systems standards and practices.
- 214.107 Working over or adjacent to water.
- 214.109 Scaffolding.
- 214.111 Personal protective equipment, generally.
- 214.113 Head protection.
- 214.115 Foot protection.
- 214.117 Eye and face protection.

#### **Appendix A to Part 214—Schedule of Civil Penalties**

Authority: 45 U.S.C. 431, 438, as amended; 49 CFR 1.49(m).

#### **Subpart A—General**

##### **§ 214.1 Purpose and scope.**

(a) The purpose of this part is to prevent accidents and casualties to employees involved in certain railroad

inspection, maintenance and construction activities.

(b) This part prescribes minimum Federal safety standards for the railroad workplace safety subjects addressed herein. This part does not restrict a railroad or railroad contractor from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

##### **§ 214.3 Application.**

This part applies to railroads that operate rolling equipment on track that is part of the general railroad system of transportation.

##### **§ 214.5 Responsibility for compliance.**

Any person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad or railroad contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. See appendix A to this part for a statement of agency civil penalty policy.

##### **§ 214.7 Definitions.**

(a) *Anchorage* means a secure point of attachment for lifelines, lanyards or deceleration devices that is independent of the means of supporting or suspending the employee.

(b) *Body belt* means a strap that can be secured around the waist or body and attached to a lanyard, lifeline, or deceleration device.

(c) *Body harness* means a device with straps that is secured about the employee in a manner so as to distribute the fall arrest forces over (at least) the thighs, shoulders, pelvis, waist, and chest and that can be attached to a lanyard, lifeline, or deceleration device.

(d) *Competent person* means one who is capable of identifying existing and predictable hazards in the workplace and who is authorized to take prompt corrective measures to eliminate them.

(e) *Deceleration device* means any mechanism, including, but not limited to, rope grabs, ripstitch lanyards, specially woven lanyards, tearing or deforming lanyards, and automatic self-retracting lifelines/lanyards that serve to dissipate a substantial amount of energy during a fall arrest, or otherwise limit the energy on an employee during fall arrest.

(f) *Equivalent* means alternative designs, materials, or methods that the railroad or railroad contractor can demonstrate will provide equal or greater safety for employees than the means specified in this part.

(g) *Free fall* means the act of falling before the personal fall arrest system begins to apply force to arrest the fall.

(h) *Free fall distance* means the vertical displacement of the fall arrest attachment point on the employee's body belt or body harness between onset of the fall and the point at which the system begins to apply force to arrest the fall. This distance excludes deceleration distance and lifeline and lanyard elongation, but includes any deceleration device slide distance or self-retracting lifeline/lanyard extension before they operate and fall arrest forces occur.

(i) *Lanyard* means a flexible line of rope, wire rope, or strap that is used to secure a body belt or body harness to a deceleration device, lifeline, or anchorage.

(j) *Lifeline* means a component of a fall arrest system consisting of a flexible line that connects to an anchorage at one end to hang vertically (vertical lifeline) or to an anchorage at both ends to stretch horizontally (horizontal lifeline), and that serves as a means for connecting other components of a personal fall arrest system to the anchorage.

(k) *Personal fall arrest system* means a system used to arrest the fall of an employee from a working level. It consists of an anchorage, connectors, body harness or body belt, lanyard, deceleration device, lifeline, or combination of these.

(l) *Railroad* means all forms of non-highway ground transportation that run on rails or electro-magnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, and (2) high-speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

(m) *Railroad employee or employee* as used in Subpart B means any employee of, or employee of a contractor of, a railroad owning or responsible for the construction, inspection, testing, or maintenance of a bridge whose assigned duties, if performed on the bridge, include inspection, testing, maintenance, repair,



construction, or reconstruction of the track, bridge structural members, operating mechanisms and water traffic control systems, or signal, communication, or train control systems integral to that bridge.

(n) *Railroad bridge* means a structure supporting one or more railroad tracks above land or water with a span length of 12 feet or more measured along the track centerline. This term applies to the entire structure between the faces of the backwalls of abutments or equivalent components, regardless of the number of spans, and includes all such structures, whether of timber, stone, concrete, metal, or any combination thereof.

(o) *Self-retracting lifeline/lanyard* means a deceleration device that contains a drum-wound line that may be slowly extracted from, or retracted onto, the drum under slight tension during normal employee movement, and which, after onset of a fall, automatically locks the drum and arrests the fall.

(p) *Snap-hook* means a connector comprised of a hook-shaped member with a normally closed keeper, that may be opened to permit the hook to receive an object and, when released, automatically closes to retain the object.

#### Subpart B—Bridge Worker Safety Standards

##### § 214.101 Purpose and scope.

(a) The purpose of this subpart is to prevent accidents and casualties arising from the performance of work on railroad bridges.

(b) This subpart prescribes minimum railroad safety rules for railroad employees performing work on bridges. Each railroad and railroad contractor may prescribe additional or more stringent operating rules, safety rules, and other special instructions not inconsistent with this subpart.

(c) These provisions apply to all railroad employees, railroads, and railroad contractors performing work on railroad bridges.

(d) Any working conditions involving the protection of railroad employees working on railroad bridges not within the subject matter addressed by this Chapter, including respiratory protection, hazard communication, hearing protection, welding and lead exposure standards, shall be governed by the regulations of the U.S. Department of Labor, Occupational Safety and Health Administration.

##### § 214.103 Fall protection, generally.

(a) Except as provided in paragraphs (b) through (d) of this section, when employees work twelve feet or more above the ground or water surface, they

shall be provided and shall use a personal fall arrest system or safety net system. All fall protection systems required by this section shall conform to the standards set forth in § 214.105 of this subpart.

(b) This section shall not apply if the installation of the fall arrest system poses a greater exposure to risk than the work to be performed. In any action brought by FRA to enforce the fall protection requirements, the railroad or railroad contractor shall have the burden of proving that the installation of such device poses greater exposure to risk than performance of the work itself.

(c) This section shall not apply where employees are working on a railroad bridge equipped with walkways, toeboards, and railings of sufficient height, width, and strength to prevent a fall, so long as employees do not work beyond the railings, over the side of the bridge, on ladders or other elevation devices, or where gaps or holes exist through which a body could fall. Where used in place of fall protection as provided for in 214.105, walkways and railings meeting standards set forth in the American Railway Engineering Association's Manual For Railway Engineering satisfy this subsection. Toeboards must be at least four inches in height.

(d) This section shall not apply where employees are performing repairs or inspections of a minor nature that are completed by working exclusively between the outside rails, including, but not limited to, routine welding, spiking, anchoring, spot surfacing, and joint bolt replacement.

##### § 214.105 Fall protection systems standards and practices.

(a) *General Requirements.* All fall protection systems required by this subpart shall conform to the following:

(1) Fall protection systems shall be used only for employee fall protection.

(2) Any fall protection system subjected to impact loading shall be immediately and permanently removed from service unless fully inspected and determined by a competent person to be undamaged and suitable for reuse.

(3) All fall protection system components shall be protected from abrasions, corrosion, or any other form of deterioration.

(4) All fall protection system components shall be inspected prior to each use for wear, damage, corrosion, mildew, and other deterioration. Defective components shall be permanently removed from service.

(5) Prior to use and after any component or system is changed, employees shall be trained in the

application limits of the equipment, proper hook-up, anchoring and tie-off techniques, methods of use, and proper methods of equipment inspection and storage.

(6) The railroad or railroad contractor shall provide for prompt rescue of employees in the event of a fall.

(7) Connectors shall have a corrosion-resistant finish, and all surfaces and edges shall be smooth to prevent damage to interfacing parts of the system.

(8) Connectors shall be drop forged, pressed or formed steel, or made of equivalent-strength materials.

(9) Anchorages, including single- and double-head anchors, shall be capable of supporting at least 5,000 pounds per employee attached, or shall be designed, installed, and used under the supervision of a qualified person as part of a complete personal fall protection system that maintains a safety factor of at least two.

(b) *Personal fall arrest systems.* All components of a personal fall arrest system shall conform to the following standards:

(1) Lanyards and vertical lifelines that tie off one employee shall have a minimum breaking strength of 5,000 pounds.

(2) Self-retracting lifelines and lanyards that automatically limit free fall distance to two feet or less shall have components capable of sustaining a minimum static tensile load of 3,000 pounds applied to the device with the lifeline or lanyard in the fully extended position.

(3) Self-retracting lifelines and lanyards that do not limit free fall distance to two feet or less, ripstitch, and tearing and deformed lanyards shall be capable of withstanding 5,000 pounds applied to the device with the lifeline or lanyard in the fully extended position.

(4) Horizontal lifelines shall be designed, installed, and used under the supervision of a competent person, as part of a complete personal fall arrest system that maintains a safety factor of at least two.

(5) Lifelines shall not be made of natural fiber rope.

(6) The personal fall arrest system shall limit the maximum arresting force on an employee to 900 pounds when used with a body belt.

(7) The personal fall arrest system shall limit the maximum arresting force on an employee to 1,800 pounds when used with a body harness.

(8) The personal fall arrest system shall bring an employee to a complete stop and limit maximum deceleration distance an employee travels to 3.5 feet.



(9) The personal fall arrest system shall have sufficient strength to withstand twice the potential impact energy of an employee free falling a distance of six feet, or the free fall distance permitted by the system, whichever is less.

(10) The personal fall arrest system shall be arranged so that an employee cannot free fall more than six feet and cannot contact the ground or any lower horizontal surface of the bridge.

(11) Personal fall arrest systems shall be worn with the attachment point of the body belt located in the center of the wearer's back, and the attachment point of the body harness located in the center of the wearer's back near shoulder level, or above the wearer's head.

(12) When vertical lifelines are used, each employee shall be provided with a separate lifeline.

(13) Devices used to connect to a horizontal lifeline that may become a vertical lifeline shall be capable of locking in either direction.

(14) Dee-rings and snap-hooks shall be capable of sustaining a minimum tensile load of 3,600 pounds without cracking, breaking, or taking permanent deformation.

(15) Dee-rings and snap-hooks shall be capable of sustaining a minimum tensile load of 5,000 pounds.

(16) Snap-hooks shall not be connected to each other.

(17) Snap-hooks shall be dimensionally compatible with the member to which they are connected to prevent unintentional disengagement, or shall be a locking snap-hook designed to prevent unintentional disengagement.

(18) Unless of a locking type, snap-hooks shall not be engaged:

(i) Directly next to webbing, rope, or wire rope;

(ii) To each other;

(iii) To a dee-ring to which another snap-hook or other connector is attached;

(iv) To a horizontal lifeline; or

(v) To any object that is incompatibly shaped or dimensioned in relation to the snap-hook so that unintentional disengagement could occur.

(c) *Safety net systems.* Use of safety net systems shall conform to the following standards and practices:

(1) Safety nets shall be installed as close as practicable under the walking/working surface on which employees are working, but shall not be installed more than 30 feet below such surface.

(2) If the distance from the working surface to the net exceeds 30 feet, employees shall be protected by personal fall arrest systems.

(3) The safety net shall be installed such that any fall from the working surface to the net is unobstructed.

(4) Except as provided in this subsection, safety nets and net installations shall be drop-tested at the jobsite after initial installation and before being used as a fall protection system, whenever relocated, after major repair, and at six-month intervals if left in one place. The drop-test shall consist of a 400-pound bag of sand 30 inches, plus or minus two inches, in diameter dropped into the net from the highest (but not less than 3½ feet) working surface on which employees are to be protected.

(i) When the railroad or railroad contractor demonstrates that a drop-test is not feasible and, as a result, the test is not performed, the railroad or railroad contractor, or designated competent person, shall certify that the net and its installation are in compliance with the provisions of this section by preparing a certification record prior to use of the net.

(ii) The certification shall include an identification of the net, the date it was determined that the net was in compliance with this section, and the signature of the person making this determination. Such person's signature shall certify that the net and its installation are in compliance with this section. The most recent certification for each net installation shall be available at the jobsite where the subject net is located.

(5) Safety nets and their installations shall be capable of absorbing an impact force equal to that produced by the drop test specified in this section.

(6) The safety net shall be installed such that there is no contact with surfaces or structures below the net when subjected to an impact force equal to the drop test specified in this section.

(7) Safety nets shall extend outward from the outermost projection of the work surface as follows:

(i) When the vertical distance from the working level to the horizontal plane of the net is 5 feet or less, the minimum required horizontal distance of the outer edge of the net beyond the edge of the working surface is 8 feet.

(ii) When the vertical distance from the working level to the horizontal plane of the net is more than 5 feet, but less than 10 feet, the minimum required horizontal distance of the outer edge of the net beyond the edge of the working surface is 10 feet.

(iii) When the vertical distance from the working level to the horizontal plane of the net is more than 10 feet, the minimum required horizontal distance of

the outer edge of the net beyond the edge of the working surface is 13 feet.

(8) Defective nets shall not be used. Safety nets shall be inspected at least once a week for mildew, wear, damage, and other deterioration. Defective components shall be removed permanently from service.

(9) Safety nets shall be inspected after any occurrence that could affect the integrity of the safety net system.

(10) Tools, scraps, or other materials that have fallen into the safety net shall be removed as soon as possible, and at least before the next work shift.

(11) Each safety net shall have a border rope for webbing with a minimum breaking strength of 5,000 pounds.

(12) The maximum size of each safety net mesh opening shall not exceed 36 square inches and shall not be longer than 6 inches on any side measured center-to-center of mesh ropes or webbing. All mesh crossing shall be secured to prevent enlargement of the mesh opening.

(13) Connections between safety net panels shall be as strong as integral net components and shall be spaced not more than 6 inches apart.

#### § 214.107 Working over or adjacent to water.

(a) Employees working over or adjacent to water with a depth of four feet or more, or where the danger of drowning exists, shall be provided and shall use life vests or buoyant work vests in compliance with U.S. Coast Guard requirements in 46 CFR 160.047, 160.052, in 160.053. Life preservers in compliance with U.S. Coast Guard requirements in 46 CFR 160.055 shall also be within ready access. This section shall not apply to employees using personal fall arrest systems or safety nets that comply with this Subpart.

(b) Life vests or buoyant work vests shall not be required when employees are conducting inspections that involve climbing structures above or below the bridge deck.

(c) Prior to each use, all flotation devices shall be inspected for defects that reduce their strength or buoyancy by designated individuals trained by the railroad or railroad contractor. Defective units shall not be used.

(d) Where life vests are required by paragraph (a) of this section, ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.



(e) Where life vests are required, at least one lifesaving skiff, inflatable boat, or equivalent device shall be immediately available. If it is determined by a competent person that environmental conditions, including weather, water speed, and terrain, merit additional protection, the skiff or boat shall be manned.

#### § 214.109 Scaffolding.

(a) Scaffolding used in connection with railroad bridge maintenance, inspection, testing, and construction shall be constructed and maintained in a safe condition and meet the following minimum requirements:

(1) Each scaffold and scaffold component, except suspension ropes and guardrail systems, but including footings and anchorage, shall be capable of supporting, without failure, its own weight and at least four times the maximum intended load applied or transmitted to that scaffold or scaffold component.

(2) Guardrail systems shall be capable of withstanding, without failure, a force of at least 200 pounds applied within two inches of the top edge, in any outward or downward direction, at any point along the top edge.

(3) Top edge height of top rails, or equivalent guardrail system member, shall be 42 inches, plus or minus three inches. Supports shall be at intervals not to exceed eight feet. Toeboards shall be a minimum of four inches in height.

(4) Midrails, screens, mesh, intermediate vertical members, solid panels, and equivalent structural members shall be capable of withstanding, without failure, a force of at least 150 pounds applied in any downward or outward direction at any point along the midrail or other member.

(5) Midrails shall be installed at a height midway between the top edge of the guardrail system and the walking/working level.

(b) Scaffolds shall not be altered or moved while they are occupied. This paragraph does not apply to vertical movements of mobile scaffolds that are designed to move vertically while occupied.

(c) An access ladder or equivalent safe access shall be provided.

(d) All exposed surfaces shall be prepared and cleared to prevent injury due to laceration, puncture, tripping, or falling hazard.

(e) All scaffold design, construction, and repair shall be completed by competent individuals trained and knowledgeable about design criteria, intended use, structural limitations, and procedures for proper repair.

(f) Manually propelled mobile ladder stands and scaffolds shall conform to the following:

(1) All manually propelled mobile ladder stands and scaffolds shall be capable of carrying the design load.

(2) All ladder stands, scaffolds, and scaffold components shall be capable of supporting, without failure, displacement, or settlement, its own weight and at least four times the maximum intended load applied or transmitted to that ladder stand, scaffold, or scaffold component.

(3) All exposed surfaces shall be free from sharp edges or burrs.

(4) The maximum work level height shall not exceed four times the minimum or least base dimensions of any mobile ladder stand or scaffold. Where the basic mobile unit does not meet this requirement, suitable outrigger frames shall be employed to achieve this least base dimension, or equivalent provisions shall be made to guy or brace the unit against tipping.

(5) The minimum platform width for any work level shall not be less than 20 inches for mobile scaffolds (towers). Ladder stands shall have a minimum step width of 16 inches. The steps of ladder stands shall be fabricated from slip resistant treads.

(6) Guardrails and midrails shall conform to the requirements listed in paragraph (a) of this section.

(7) A climbing ladder or stairway shall be provided for proper access and egress, and shall be affixed or built into the scaffold and so located that in its use it will not have a tendency to tip the scaffold.

(8) Wheels or casters shall be capable of supporting, without failure, at least four times the maximum intended load applied or transmitted to that component. All scaffold casters shall be provided with a positive wheel and/or swivel lock to prevent movement. Ladder stands shall have at least two of the four casters and shall be of the swivel type.

#### § 214.111 Personal protective equipment, generally.

The railroad or railroad contractor shall provide and the employee shall use appropriate personal protective equipment described in this subpart in all operations where there is exposure to hazardous conditions, or where this subpart indicates the need for using such equipment to reduce the hazards to railroad employees.

#### § 214.113 Head protection.

(a) Railroad employees working in areas where there is a possible danger of head injury from impact, or from

falling or flying objects, or from electrical shock and burns, shall be provided and shall wear protective helmets.

(b) Helmets for the protection of railroad employees against impact and penetration of falling and flying objects shall conform to the national consensus standards for industrial head protection (American National Standards Institute, Z89.1-1969, Safety Requirements for Industrial Head Protection).

(c) Helmets for the head protection of railroad employees exposed to high voltage electrical shock and burns shall conform to the national consensus standards (American National Standards Institute, Z89.2-1971).

#### § 214.115 Foot protection.

(a) The railroad or railroad contractor shall require railroad employees to wear foot protection equipment when potential foot injury may result from impact, falling or flying objects, electrical shock or burns, or other hazardous condition.

(b) Safety-toe footwear for railroad employees shall conform to the national consensus standards for safety-toe footwear (American National Standards Institute, American National Standard for Men's Safety-Toe Footwear, Z41.1-1967).

#### § 214.117 Eye and face protection.

(a) Railroad employees shall be provided and shall wear eye and face protection equipment when potential eye or face injury may result from physical, chemical, or radiant agents.

(b) Eye and face protection equipment required by this section shall conform to the national consensus standards for occupational and educational eye and face protection (American National Standards Institute, Z87.1-1968, Practice for Occupational and Educational Eye and Face Protection).

(c) Face and eye protection equipment required by this section shall be kept clean and in good repair. Use of equipment with structural or optical defects is prohibited.

(d) Railroad employees whose vision requires the use of corrective lenses, when required by this regulation to wear eye protection, shall be protected by goggles or spectacles of one of the following types:

(i) Spectacles whose protective lenses provide optical correction the frame of which includes shielding against objects reaching the wearer's eyes around the lenses;

(ii) Goggles that can be worn over corrective lenses without disturbing the adjustment of the lenses; or



(iii) Goggles that incorporate corrective lenses mounted behind the protective lenses.

APPENDIX A TO PART 214.—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>

Section	Violation	Willful
<b>Subpart B—Bridge Worker Safety Standards</b>		
214.103 Fall protection:		
(i) Failure to provide fall protection.....	\$5,000	\$10,000
(ii) Failure to use fall protection.....		2,500
214.105 Standards and practices:		
(a) General:		
(1) Fall protection used for other purposes.....	2,500	5,000
(2) Failure to remove from service.....	2,500	5,000
(3) Failure to protect from deterioration.....	2,500	5,000
(4) Failure to inspect and remove.....	5,000	10,000
(5) Failure to train.....	5,000	10,000
(6) Failure to provide for prompt rescue.....	5,000	10,000
(7) Failure to prevent damage.....	2,500	5,000
(8) Failure to use proper connectors.....	2,500	5,000
(9) Failure to use proper anchorages.....	2,500	5,000
(b) Fall arrest system:		
(1)-(17) Failure to provide conforming equipment.....	2,500	5,000
(c) Safety net systems:		
(1) Failure to install close to workplace.....	2,500	5,000
(2) Failure to provide fall arrest if over 30 feet.....	5,000	10,000
(3) Failure to provide for unobstructed fall.....	5,000	\$10,000
(4) Failure to test.....	2,500	5,000
(5) Failure to use proper equipment.....	2,500	5,000
(6) Failure to prevent contact with surface below.....	5,000	10,000
(7) Failure to properly install.....	5,000	10,000
(8) Failure to remove defective nets.....	5,000	10,000
(9) Failure to inspect.....	5,000	10,000
(10) Failure to remove objects.....	1,000	2,500
(11)-(13) Failure to use conforming equipment.....	2,500	10,000
214.107 Working over water:		
(a)(i) Failure to provide life vest.....	5,000	10,000
(ii) Failure to use life vest.....		1,500
(c) Failure to inspect.....	2,500	5,000
(e)(i) Failure to provide ring bouys.....	5,000	10,000
(ii) Failure to use ring bouys.....		1,500
(f)(i) Failure to provide skiff.....	1,000	2,500
(ii) Failure to use skiff.....		1,500
214.109 Scaffolding:		
(a)-(f) Failure to provide conforming equipment.....	2,500	5,000
214.113 Head protection:		
(a)(i) Failure to provide.....	2,500	5,000
(ii) Failure to use.....		1,500
(b) or (c) Failure to provide conforming equipment.....	2,500	5,000
214.115 Foot protection:		
(a)(i) Failure to require use of.....	2,500	5,000
(ii) Failure to use.....		1,500
214.117 Eye and face protection:		
(a)(i) Failure to provide.....	2,500	5,000
(ii) Failure to use.....		1,500
(b) Failure to use conforming equipment.....	2,500	5,000
(c) Use of defective equipment.....	2,500	5,000
(d) Failure to provide for corrective lenses.....	2,500	5,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

Issued in Washington, DC on June 16, 1992.

Gilbert E. Carmichael,

Federal Railroad Administrator.

[FR Doc. 92-14566 Filed 6-23-92; 8:45 am]

BILLING CODE 4910-08-M

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 285

[Docket No. 920124-2024]

## Atlantic Tuna Fisheries; Bluefin Tuna

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Reduction in bag limit.

**SUMMARY:** NMFS issues this notice to (1) reduce the daily catch limit in the Angling category from two to one Atlantic bluefin tuna per person for fish less than 77 inches (196 cm); and (2) reduce the daily vessel limit for medium Atlantic bluefin tuna from two to one. This action is necessary to improve management of the angling sector, which in recent years has exceeded the assigned annual quota. The intent of this action is to extend the fishing season and help ensure that the United States fulfills its obligations to conserve and



manage the Atlantic bluefin tuna resource in accordance with the recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT).

**EFFECTIVE DATE:** The reduction in bag limits is effective 0001 hours local time June 22, 1992, through December 31, 1992.

**FOR FURTHER INFORMATION CONTACT:** Richard B. Stone, 301-713-2347.

**SUPPLEMENTARY INFORMATION:** On March 12, 1992, NMFS published a final rule at 57 FR 8728 to amend the regulations governing the Atlantic bluefin tuna fishery (50 CFR part 285). The intent of that action was to improve management of the angling sector, which in recent years has exceeded the assigned annual quota and help ensure that the United States fulfills its obligations to conserve and manage the Atlantic bluefin tuna resource in

accordance with the recommendations of ICCAT.

Section 285.24(c) of the regulations at 50 CFR part 285 allows the Assistant Administrator for Fisheries, NOAA (Assistant Administrator) to adjust the angler catch limit to one school or medium Atlantic bluefin tuna per day based on a review of available information on landing trends, or any other relevant factors, to provide for a longer fishing season. Based on the reported landings of Atlantic bluefin tuna to date in the Angling category, catch rates that are similar to catch rate averages for the years 1988-1990, and projections that the 81 mt allowable harvest of bluefin less than 120 cm could be exceeded by the end of June, the Assistant Administrator finds it necessary to adjust the daily catch limit for this segment of the Atlantic bluefin tuna fishery to one young school, school, or medium bluefin per angler and one medium bluefin per vessel.

#### Classification

This action is taken under the authority of 50 CFR 285.24(c), and complies with Executive Order 12291. Notice of this action will be mailed to Atlantic bluefin tuna dealers, permit holders, recreational fishery interests, and media representatives. Also, NMFS will make calls to marina owners, state fishery personnel, angling club representatives, and enforcement personnel.

#### List of Subjects in 50 CFR Part 285

Fisheries, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: June 18, 1992.

**Richard H. Schaefer,**

*Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.*

[FR Doc. 92-14798 Filed 6-19-92; 9:35 am]

BILLING CODE 3510-22-M



# Proposed Rules

Federal Register

Vol. 57, No. 122

Wednesday, June 24, 1992

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Stabilization and Conservation Service

#### 7 CFR Part 736

#### Issuance of Warehouse Receipts Under the U.S. Warehouse Act

**AGENCY:** Agricultural Stabilization and Conservation Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Agricultural Stabilization and Conservation Service (ASCS) proposes to amend its regulations pertaining to licensed grain warehousemen under the U.S. Warehouse Act (USWA). USWA licensed warehousemen are required to issue negotiable or non-negotiable warehouse receipts to depositors within one year of deposit. The proposed rule would permit expanded use of non-negotiable warehouse receipts. This rule proposes to remove the requirement to return the original non-negotiable receipt before the last portion of a lot of grain is delivered, provided acceptable documentation exists that all obligations have been satisfied. Also, in cases of lost or destroyed non-negotiable warehouse receipts, depositors will not be required to obtain a bond.

The intent of the proposal is to maintain the integrity of U.S. Warehouse Act licenses and warehouse receipts, while permitting warehousemen and depositors the flexibility necessary to follow common industry practices.

**DATES:** Comments must be received on or before August 24, 1992 in order to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments to: Director, Licensing Authority Division, U.S. Department of Agriculture (USDA), Agricultural Stabilization and Conservation Service, P.O. Box 2415, Room 5962-S, Washington, DC 20013, telephone (202) 720-2121, FAX (202) 690-0014.

All submissions will be available for public inspection during regular business hours in Room 5962-S, South Agriculture Building, USDA, 14th and Independence Avenue, SW, Washington, DC 20250.

#### FOR FURTHER INFORMATION CONTACT:

Lynda Moore, Agricultural Marketing Specialist, ASCS, USDA, telephone (202) 720-2121.

#### SUPPLEMENTARY INFORMATION:

##### Rulemaking Matters

This proposed rule has been reviewed under United States Department of Agriculture (USDA) procedures established in accordance with Executive Order 12291 and Departmental Regulation No. 1512-1 and has been designated as "not major". It has been determined that these provisions will not result in: (1) An annual effect on the economy of \$100 million or more; (2) major increases in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Keith D. Bjerke, Administrator, ASCS, has certified that this action will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Therefore, no regulatory flexibility analysis is required.

The Office of the General Counsel has certified to the Office of Management and Budget that these proposed regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order No. 12778.

It has been determined by an environmental evaluation that this action will not have significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is needed.

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with state and local officials. See the Notice related to 7 CFR

part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

This proposed rule does not impose any new information collections on the public.

#### Background

The U.S. Warehouse Act was enacted in 1916 to improve the agricultural warehousing industry. When the Act was passed, storage facilities were inadequate, there were no consistent standards and practices for warehousemen to follow, and warehouse receipts were not uniform and not universally accepted. The Act's system of licensing, bonding, and examination assures warehouse receipt holders that their products will be properly maintained and delivered when they surrender their receipts.

The Act is administered primarily through a program of comprehensive warehouse examinations—usually once or twice annually on an unannounced basis. Examiners review the warehouseman's obligations to depositors as represented by the records of the warehouseman and agency control over the printing of warehouse receipts. The examiner physically inventories all stocks on hand and compares the measured quantity and determined quality with obligations.

Many depositors do not want the warehouseman to issue negotiable warehouse receipts because safe keeping is required.

In most cases, the Act does not differentiate between negotiable and non-negotiable warehouse receipts. The regulations under the Act address non-negotiable receipts and require the return of the non-negotiable receipt before the last portion of the commodity represented by that receipt is delivered. This proposal would allow delivery of the commodity without requiring the return of an original, non-negotiable receipt. Since a non-negotiable warehouse receipt, by its terms, cannot be negotiated, a statement of loss and receipt for the commodity from the depositor is acceptable in the case of a lost or destroyed non-negotiable receipt.

#### List of Subjects in 7 CFR Part 736

Administrative practice and procedure, Grains, Reporting and recordkeeping requirements, Surety bonds, Warehouses.



**Proposed Rule**

Accordingly, it is proposed that 7 CFR part 736 be amended as follows:

**PART 736—GRAIN WAREHOUSES**

1. The authority citation for 7 CFR part 736 is revised to read as follows:

Authority: 7 U.S.C. 241 *et seq.*

2. Section 736.21 is amended by revising paragraph (b) to read as follows:

**§ 736.21 Lost or destroyed receipts; bond.**

(b) Before issuing such new or duplicate negotiable receipt the warehouseman shall require the depositor or other person applying therefor to make and file with him (1) an affidavit showing that the applicant is lawfully entitled to the possession of the original receipt, that he has not negotiated or assigned it, how the original receipt was lost or destroyed, and if lost, that diligent effort has been made to find the receipt without success, and (2) a bond in an amount double the value, at the time the bond is given, of the grain represented by the lost or destroyed receipt. Such bond shall be in a form approved for the purpose by the Secretary, or his designated representative, shall be conditioned to indemnify the warehouseman against any loss sustained by reason of the issuance of such receipt, and shall have as surety thereon preferably a surety company which is authorized to do business, and is subject to service of process in a suit on the bond, in the state in which the warehouse is located or at least two individuals who are residents of such state and each of whom owns real property therein having a value, in excess of all exemptions and encumbrances, equal to the amount of the bond. Before issuing such new or duplicate non-negotiable receipt, obtain a written statement from the holder that the original non-negotiable receipt is lost and requires the issuance of a duplicate non-negotiable receipt.

3. Section 736.24 is revised to read as follows:

**§ 736.24 Return of receipts before delivery of grain.**

Except as permitted by law or by the regulations in this part, a warehouseman shall not deliver any grain for which he has issued a negotiable receipt until the receipt has been returned to him and canceled; and shall not deliver grain for which he has issued a non-negotiable receipt until such receipt has been returned, or he has obtained from the depositor or the depositor's agent, a

written order therefor and a receipt upon delivery.

Signed at Washington, DC, on June 18, 1992.

John A. Stevenson,

Acting Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 92-14740 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-05-M

**Animal and Plant Health Inspection Service****9 CFR Part 75**

[Docket No 92-055-1]

**Dourine in Horses and Asses**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to remove the "Dourine in Horses and Asses" regulations, which restrict the movement of horses and asses from areas quarantined for dourine and provide for the payment of compensation to the owners of animals destroyed because of dourine. This action appears to be warranted because the United States has been free of dourine since 1946 and import requirements have proven adequate to prevent the reintroduction of the disease into this country. This action would remove the implication that dourine has not yet been eradicated in the United States and would eliminate unnecessary regulations.

**DATES:** Consideration will be given only to comments received on or before July 24, 1992.

**ADDRESSES:** To help ensure that your written comments are considered, send an original and three copies to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 92-055-1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Dr. Manuel A. Thomas, Jr., Senior Staff Veterinarian, Sheep, Goat, Equine, Poultry, and Miscellaneous Diseases Staff, VS, APHIS, USDA, room 769, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-6954.

**SUPPLEMENTARY INFORMATION:****Background**

The "Dourine in Horses and Asses" regulations (contained in 9 CFR 75.1

through 75.3 and referred to below as "the regulations") require that all horses and asses be inspected by a Veterinary Services inspector and certified as dourine-free before they may be moved interstate from an area quarantined for dourine. The regulations further require that all horses and asses pass the complement-fixation test for dourine before they may be moved interstate from a quarantined area if, within the preceding 18 months, stallions or jacks were allowed to roam at large in that quarantined area or if there has been any breeding in a herd in the quarantined area in which there is a horse or ass that has been exposed to dourine.

Section 75.3 of the regulations provides for the payment of compensation to the owners of animals destroyed because of dourine in accordance with the dourine indemnity regulations. Those indemnity regulations, which had been located at 9 CFR part 52, were removed by a final rule published in the *Federal Register* on December 31, 1981 (46 FR 63206). Two of the three reasons set forth in that final rule to justify the removal of 9 CFR part 52—that the United States has been free of dourine since 1946 and that import requirements have proven adequate to prevent the reintroduction of the disease—also support our proposed removal of the "Dourine in Horses and Asses" regulations. The fact that 9 CFR part 52 was indeed removed further supports our proposal.

The regulations were established to promote the eradication of dourine within the United States by preventing its spread through restrictions on the interstate movement of horses and asses from quarantined areas and by providing indemnity for the destruction of infected animals. In that the United States has been free of dourine since 1946, the objectives of the regulations have been met. The quarantine requirements in 9 CFR 92.308(a)(3) contain provisions that help ensure that dourine is not reintroduced into the United States. These provisions require that all horses, asses, mules, and zebras intended for importation into the United States must test negative to an official test for dourine to qualify for release from quarantine.

We are, therefore, proposing to remove the "Dourine in Horses and Asses" regulations. This action would remove the implication that dourine has not yet been eradicated in the United States and would eliminate from the CFR an inaccurate reference to a compensation program for animals destroyed because of dourine.



**Executive Order 12291 and Regulatory Flexibility Act**

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this proposed rule, if adopted, would have an effect on the economy of less than \$100 million; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and would not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Removing the "Dourine in Horses and Asses" regulations would not result in any change in the number of horses or asses moved interstate, or in any regulatory activities necessary to qualify horses or asses for interstate movement, because there are no longer any areas in the United States that are quarantined because of dourine. Therefore, there is no reason to expect any economic consequences related to our proposed action.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to the Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V).

**Executive Order 12778**

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this proposed rule is adopted: (1) No State and local laws and regulations will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suite in court challenging this rule.

**Paperwork Reduction Act**

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 9 CFR Part 75**

Animal diseases, Horses, Quarantine, Transportation.

Accordingly, we propose to amend 9 CFR part 75 as follows:

**PART 75—COMMUNICABLE DISEASES IN HORSES, ASSES, PONIES, MULES, AND ZEBRAS**

1. The authority citation for part 75 would continue to read as follows:

Authority: 21 U.S.C. 111–113, 115, 117, 120, 121, 123–126, 134–134h; 7 CFR 2.17, 2.51, and 371.2(d).

**§§ 75.1 through 75.3 [Removed and Reserved]**

2. Sections 75.1 through 75.3 would be removed and reserved.

Done in Washington, DC, this 18th day of June 1992.

Robert Melland,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 92-14818 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-34-M

**DEPARTMENT OF ENERGY****Office of the Secretary****10 CFR Part 600****Financial Assistance Rules; Continuation Awards**

AGENCY: Department of Energy.

ACTION: Proposed rule.

**SUMMARY:** The Department of Energy (DOE) today is proposing a revision to subpart A of the Financial Assistance Rules, 10 CFR part 600, to permit a continuation application for a research award to be submitted without detailed budgetary information. This proposed revision was identified in connection with implementation of the President's January 28, 1992, Memorandum for Certain Department and Agency Heads on the subject of "Reducing the Burden of Government Regulation." In that regard, this proposed revision is associated with the proposal on 10 CFR part 605 appearing elsewhere in today's Federal Register.

**DATES:** Written comments on the proposed rule must be received by July 24, 1992.

**ADDRESSES:** Comments should be addressed to: James J. Cavanagh, Director, Business and Financial Policy Division (PR-122), Office of Procurement, Assistance and Program Management, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:**

Edward F. Sharp, Business and Financial Policy Division, (PR-122), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-8192.  
Mary Ann Masterson, Office of the Assistant General Counsel, Procurement and Finance (GC-34), U.S. Department of Energy, Washington, DC 20585, (202) 586-1900.

**SUPPLEMENTARY INFORMATION:****Table of Contents**

- I. Introduction
- II. Changes to 10 CFR Part 600
- III. Review under Executive Order 12612
- IV. Review under Executive Order 12291
- V. Review under the Regulatory Flexibility Act
- VI. Review under the Paperwork Reduction Act
- VII. Review under the National Environmental Policy Act
- VIII. Review under Executive Order 12778
- IX. Public Comments

**I. Introduction**

The DOE is today proposing to amend its Financial Assistance Rules (Rules) to permit recipients of research awards, in certain cases, to submit requests for continuation funding without detailed budgetary information on how funds are to be spent in the upcoming period. This will be permitted in those situations in which a new or renewal application contained detailed future year budgets which permitted the DOE to evaluate the future years at the time the initial award was made. Should there be a significant change in the direction of the project or the budget, a detailed budget could still be required for continuation award. This proposed rulemaking is in response to the President's January 28, 1992, Memorandum for Certain Department and Agency Heads on the subject of "Reducing the Burden of Government Regulation."

**II. Changes to 10 CFR Part 600**

Section 600.31(b)(3) is to be changed to permit a continuation award to be made without a detailed budget being submitted with the continuation application if the new or renewal application contained detailed future-year budgets.

**III. Review under Executive Order 12612**

Executive Order 12612 requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the



Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. Today's rule, when finalized, will revise certain policy and procedural requirements. However, the DOE has determined that none of the revisions will have a substantial direct effect on the institutional interests or traditional functions of States.

#### IV. Review under Executive Order 12291

Today's rule was reviewed under Executive Order 12291. The DOE has concluded that the rule is not a "major rule" because its promulgation will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete in domestic or export markets. In accordance with requirements of the Executive Order, this rulemaking has been revised by the Office of Management and Budget (OMB).

#### V. Review under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act of 1980, Public Law 96-354, 94 Stat. 1164, which requires preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities; i.e., Small businesses, small organizations, and small governmental jurisdictions. The DOE has concluded that the rule would only affect small entities as they apply for and receive financial assistance and does not create additional economic impact on small entities. The DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

#### VI. Review under the Paperwork Reduction Act

No information collection or recordkeeping requirements are imposed upon the public by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, or OMB's implementing regulations at 5 CFR part 1320.

#### VII. Review under the National Environmental Policy Act

The DOE has concluded that promulgation of these rules clearly would not represent a major Federal action having significant impact on the human environment under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.* (1976)), the Council on Environmental Quality Regulations (40 CFR parts 1500-1508), and the DOE guidelines (10 CFR part 1021) and, therefore, does not require an environmental impact statement pursuant to NEPA.

#### VIII. Review under Executive Order 12278

Section 2 of Executive Order 12278 instructs each agency subject to Executive Order 12291 to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards (whether they be engineering or performance standards), and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort that the regulation: Specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that today's proposal meets the requirements of sections 2(a) and (b) of Executive Order 12278.

#### IX. Public Comments

Interested persons are invited to participate in this rulemaking by submitting data, views, or arguments with respect to the proposed changes set forth in this notice. Three copies of written comments should be submitted to the address indicated in the "ADDRESS" section of this notice. All comments received will be available for public inspection in the DOE Reading Room, room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, between the hours of 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by July 24, 1992, will be fully considered prior to publication of a final rule resulting from this proposal. Any information you consider to be confidential must be so identified and submitted in writing, one

copy only. The DOE reserves the right to determine the confidential status of the information and to treat it according to our determination.

The DOE has concluded that this proposed rule does not involve a substantial issue of fact or law and that the proposed rule should not have substantial impact on the nation's economy or a large number of individuals or businesses. Therefore, pursuant to Public Law 95-91, the DOE Organization Act, and the Administrative Procedure Act (5 U.S.C. 553), the DOE does not plan to hold a public hearing on this proposed rule.

#### List of Subjects in 10 CFR Part 600

Cooperative agreements/energy; Education institutions; Energy; Grants/energy; Non-profit organizations; Reporting requirements.

Issued in Washington, DC, June 12, 1992.

Berton J. Roth,

Acting Director, office of Procurement, Assistance, and Program Management.

For the reasons set out in the preamble, the Department of Energy hereby proposes to amend part 600 of chapter II of title 10 of the Code of Federal Regulations as set forth below.

#### PART 600—FINANCIAL ASSISTANCE RULES

1. The authority citation for part 600 continues to read as follows:

Authority: Secs. 644 and 646, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Pub. L. 97-258, 96 Stat. 1003-1005 (31 U.S.C. 6301-6308), unless otherwise noted.

2. § 600.31 is amended by revising paragraph (b)(3) to read as follows:

§ 600.31 Funding.

• • • • •

(b) • • •

(3) A detailed budget for the upcoming budget period, including an estimate of unobligated balances (§ 600.32(c)). For research awards, a detailed budget need not be submitted if the new or renewal application contained future-year budgets sufficiently detailed to allow the DOE to review and approve the categories and elements of cost. Should the research award have a change in scope or significant change in the budget, the DOE may request a detailed budget. DOE shall review a continuation application for the adequacy of the awardee's progress and planned conduct of the project in the subsequent budget period. DOE shall not require a continuation application to compete against any other application. The amount and award of continuation



funding is subject to the availability of appropriations.

[FR Doc. 92-14408 Filed 6-22-92; 9:46 am]  
BILLING CODE 6450-01-M

## Office of Energy Research

### 10 CFR Part 605

#### Special Research Grants Program

**AGENCY:** Office of Energy Research, DOE.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Energy (DOE) today is issuing this notice of proposed rulemaking (NOPR) for Special Research Grants Program, to be renamed the Office of Energy Research Financial Assistance Program, in connection with DOE's implementation of the President's regulatory review program. The proposal would streamline, make uniform, clarify and reduce the burden of 10 CFR part 605. This proposal is associated with the proposal on 10 CFR part 600 appearing elsewhere in today's Federal Register.

**DATES:** Written comments must be received July 24, 1992.

**ADDRESSES:** Send comments to: U.S. Department of Energy, Office of Energy Research, ER-64/GTN, Mail Stop G-236, Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert A. Zich, Director, U.S. Department of Energy, Acquisition and Assistance Management Division, Office of Energy Research, ER-64/GTN, Washington, DC 20585, (301) 903-5544.

#### SUPPLEMENTARY INFORMATION:

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## I. Introduction and Background

In accordance with the DOE's response to the President's request for regulatory reform, the Office of Energy Research (ER) is hereby proposing to amend 10 CFR part 605. The proposal would streamline part 605, make part 605 uniform with other agencies' practices, and clarify the policies and

administrative requirements for the award of grants in program areas of scientific, technical or educational interest to ER. The proposal would delete provisions of part 605 that are unduly burdensome to financial assistance award recipients. The basis for the proposed amendments is ER's participation as a member of the Federal Demonstration Project, along with 10 other Federal agencies, that has for the past three years been testing a streamlined grant continuation funding process.

## II. Amendments to 10 CFR Part 605

The following amendments are proposed today:

Part 605 has been renamed "The Office of Energy Research Financial Assistance Program," since ER program areas fund awards for research, training, education and other related activities. This amended name should replace the use of "The Special Research Grant Program" wherever it is used in part 605. In addition, any reference to a continuation application should be deleted from the program. Except for the above stated amendments the following are the only amendments being proposed at this time:

Section 605.1 is amended to include the addition of educational activities under 10 CFR part 605.

Section 605.3 is amended to include a definition for the term "Educational/Training" since ER program areas have increased activities in this area.

Section 605.5 is amended to include new or revised ER program areas.

Section 605.8 is amended to correct ER's telephone number and delete the requirement to publish in the Commerce Business Daily ER announcements under 10 CFR part 605.

Section 605.9 is amended to delete ER's requirement for a continuation application and require the addition of detailed budget information in original and renewal applications. This section also changes the receipt date for renewal applications from six months to nine months to allow more time for peer reviewers to provide feedback to ER program managers on evaluation of pending applications.

Section 605.19 is amended to reduce the annual performance reporting requirements and to institute the use of the report in lieu of a formal continuation application. In addition, the distribution and schedule of documents contained in CFR part 605 has been amended to include all changes outlined for reporting requirements under § 605.19. Appendix A also has been amended to include current ER program office descriptions.

## III. Opportunity for Public Comment

Written comments from interested persons are invited in response to this NOPR by submitting three copies of data, views or arguments with respect to the proposals set forth in this notice to the address above. Please identify any comments submitted as "ER Amendments."

This notice of proposed rulemaking does not involve any significant issues of law or fact and the rule would be unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses. Accordingly, pursuant to 42 U.S.C. 7191(c) and 5 U.S.C. 553, DOE is not scheduling a public hearing.

## IV. Review Under Executive Order 12291

This NOPR has been reviewed by OMB under Executive Order 12291 (46 FR 13192, February 17, 1981). Prior to publication of the NOPR, DOE concluded that the proposed rule is not a "major rule" because its promulgation would not result in (1) an annual effect on the economy of \$100 million or more, (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete in domestic or export markets.

## V. Review Under the Regulatory Flexibility Act

This NOPR was reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 95 Stat. 1164) which requires preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities, i.e., small business, small organizations, and small governmental jurisdictions. DOE concluded that this proposed rule would only affect small entities as they apply for and receive awards and does not create additional economic impacts on small entities. Accordingly, DOE certifies that this NOPR will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

## VI. Review Under the Paperwork Reduction Act

The collection of information requirements contained in this NOPR have been approved by OMB under



control numbers 1910-0040 and 1910-1400.

## VII. Review Under the National Environmental Policy Act

DOE has concluded that the NOPR clearly would not represent a major Federal action having significant impact on the human environment under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.* (1976)), the Council on Environmental Quality Regulations (40 CFR parts 1500-1508), and the DOE guidelines (10 CFR part 1021) and, therefore, does not require an environmental impact statement pursuant to NEPA.

## VIII. Intergovernmental Review

This program is generally not subject to the intergovernmental review requirements of Executive Order 12372 as implemented by 10 CFR part 1005. However, certain grant applications may be. All applications from governmental or non-governmental entities which involve research, development or demonstration activities are subject to the provisions of the Executive Order and 10 CFR part 1005 when such activities: (1) Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area; (2) necessitate the preparation of an Environmental Impact Statement under NEPA; or (3) are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public. Those planning to submit covered applications should immediately contact ER for further information.

## IX. Review Under Executive Order 12612

Executive Order 12612 requires that regulations or rules be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. Today's proposal would amend existing regulations for a financial assistance program to stimulate research and development, as well as educational and training activities. There will not be any substantial direct effects on States.

## X. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency subject to Executive Order 12291 to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set

forth in sections 2 (a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards (whether they be engineering or performance standards), and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: Specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that today's proposal meets the requirements of sections 2 (a) and (b) of Executive Order 12778.

## XI. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for 10 CFR part 605 is 81.049.

### Lists of Subjects in 10 CFR Part 605

Energy, Grant programs-energy, Reporting and recordkeeping requirements, Research.

In consideration of the foregoing, part 605 of chapter II of title 10 of the Code of Federal Regulations is proposed to be amended as set forth below.

Issued in Washington, DC on June 15, 1992.

Robert M. Simon,

Principal Deputy Director, Office of Energy Research.

Part 605 of Chapter II of title 10, Code of Federal Regulations, is proposed to be amended as follows:

## PART 605—THE OFFICE OF ENERGY RESEARCH FINANCIAL ASSISTANCE PROGRAM

1. The authority citation continues to read as follows:

Authority: Sec. 31 of the Atomic Energy Act, as amended, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2051); sec. 107 of the Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1240 (42 U.S.C. 5817); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, 88 Stat. 1878 (42 U.S.C. 5901 *et seq.*); Secs. 644 and 646 of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Federal Grant and Cooperative Agreement Act, as amended (31 U.S.C. 6301 *et seq.*).

2. The part heading is revised to read as set forth above.

### § 605.1 [Amended]

3. In § 605.1, after the phrase "basic and applied research," remove the remainder of the sentence and add the

following: " \* \* \* educational or training activities, conferences and related activities."

4. Section 605.3 is amended by replacing "applies" with "applied" in the title of paragraph (a), by removing the paragraph designations, and by adding a definition for "educational/training" in alphabetical order to read as follows:

### § 605.3 Definitions.

\* \* \* \* \*

*Educational/Training* means support for education or related activities for an individual or organization that will enhance education levels and skills in particular scientific or technical areas of interest to DOE.

\* \* \* \* \*

5. Revise § 605.5 to read as follows:

### § 605.5 The Office of Energy Research Financial Assistance Program.

(a) DOE may issue, under the Office of Energy Research Financial Assistance Program, 10 CFR part 605, awards for basic and applied research, educational/training activities, conferences, and other related activities under the ER program areas set forth in paragraph (b) of this section and described in appendix A of this part.

(b) The Program areas are:

- (1) Basic Energy Sciences
- (2) Field Operations Management
- (3) Fusion Energy
- (4) Health and Environmental Research
- (5) High Energy and Nuclear Physics
- (6) Scientific Computing Staff
- (7) Superconducting Super Collider
- (8) Technology Analysis
- (9) University and Science Education Programs

(10) Program Analysis; and  
(11) Other program areas of interest as may be described in a notice of availability published in the Federal Register.

6. Section 605.8 is amended as follows:

A. In paragraph (c), revise the phone number to read "(301) 903-5544";

B. In paragraph (d), revise the first sentence to read: "DOE shall publish annually, in the Federal Register, a notice of availability of the Office of Energy Research Financial Assistance Program";

C. Paragraphs (d)(2) (ii) and (iii) are revised to read as follows:

### § 605.8 Solicitation.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) A project agenda or potential areas for project initiatives;



(iii) Problem areas requiring additional effort, and

7. Section 605.9 is amended as follows:

A. The section heading is revised;  
B. Paragraphs (b)(4), (c) and (d) are revised;

C. Paragraph (b)(4)(i) is amended by replacing the words "Budget information" with "Numeric details on items of cost" in the first sentence;

D. Paragraph (h) is removed and paragraphs (i) and (j) are redesignated as paragraphs (h) and (i);

E. In newly redesignated paragraph (h), replace "six months" with "nine months" in the first sentence of that paragraph;

F. Add new paragraph (j).

Amended § 605.9 is set out below:

#### § 605.9 Application requirements.

(b) \* \* \*

(4) A detailed budget for the entire proposed period of support with written justification sufficient to evaluate the itemized list of costs provided on the entire project.

(c) Applications for a renewal award must be submitted in an original and seven copies, except that State governments, local governments, or Indian tribes are required to submit only an original and two copies. (Approved by OMB under OMB Control Numbers 0348-0005-0348-0009.)

(d) The application must be signed by an official who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the award, if one is issued, or if unaffiliated, by the individual applicant. (See § 605.19(a)(1) for requirements on continuation awards.)

(j) Renewal applications must include a progress report bound separately from the remainder of the application.

8. The section heading of § 605.19 is revised to read as set forth below and § 605.19(a)(1) is revised to read as follows and in paragraph (a)(2) replace "Form 538" with "Form 1430.22":

#### § 605.19 Continuation funding and reporting requirements.

(a) \* \* \*

(1) *Performance reports.* After issuance of an initial award and if future support is recommended, recipients must submit a satisfactory performance report in order to receive a continuation award for the remainder of the project period. The original and two copies of the required report (not to exceed two pages) must be submitted to the ER

program manager 90 days prior to the anticipated continuation funding date and contain the following information: on the top of page 1, provide the project title, principal investigator/project director name, period of time report covers, name and address of recipient organization, DOE award number; the amount of unexpended funds, if any, and if available, provide information as to why they are unspent. Report shall state whether aims have changed from original application and if they have, provide revised aims. Include results of work to date. Emphasize findings and their significance to the field, relevance to ER mission and any real or anticipated problems. Provide information on numbers of graduate students supported under the award and include information on all foreign travel undertaken.

9. The table, referenced in § 605.19(c) is moved to appear at the end of § 605.19 and is revised to read as follows:

TABLE TO § 605.19—DISTRIBUTION AND SCHEDULE OF DOCUMENTS

Type	When due	Number of copies for awarding office
1. Summary: 200 words on scope and purpose (Notice of Energy R&D Project)	Immediately after a grant is awarded and with each application for renewal.	3
2. Renewal	9 months before the project period ends.	8
3. Annual Technical Progress Report.	90 days prior to the next budget period.	3
4. Other progress reports, brief topical reports, etc. (Designated when significant results develop or when work has direct programmatic impact).	As deemed appropriate by the grantee.	3
5. Reprints, Conference papers.	Same as 4 above	3
6. Final Report	Within 90 days after termination of the project.	3
7. Financial Status Report.	Within 90 days after completion of the project period; for budget periods exceeding 12 months an FSR is also required within 90 days after the first 12-month period.	3

NOTE: Report types 3, 4, 5, and 6 require with submission two copies of DOE Form 1332.16, Uni-

versity-Type Contractor and Grantee Recommendations for Disposition of Scientific and Technical Document.

10. Appendix A of part 605 is revised as follows:

#### Appendix A—Energy Research Program Office Descriptions

##### 1. Basic Energy Sciences

This program supports basic science research efforts in a variety of disciplines to broaden the energy supply and technological base knowledge. The major science division and its objectives are as follows:

##### (a) Energy Biosciences

The primary objective of this program is to generate a basis of understanding of fundamental biological mechanisms in the areas of botanical and microbiological sciences that will support biotechnology development related to energy. The research serves as the basic information foundation with respect to renewable resource productivity for fuels and chemicals, microbial conversions or renewable materials and biological systems for the conservation of energy. This office has special requirements on the submission of preapplications, when to submit, and the length of the preapplication/application; applicants are encouraged to contact the office regarding these requirements.

##### (b) Chemical Sciences

This program has as its primary objectives: Increased understanding of basic chemical or physical phenomena which are likely to be important to existing or future technological concepts for production or conversion of energy; discovery of new phenomena bearing on chemical or physical aspects of energy processes; elucidation of fundamentally new general techniques for separation of energy-related mixtures or for the chemical analysis of energy-related substances. Also included is a study of the basic chemical and physical properties of the actinide elements and their compounds. This program supports the operation of the Stanford Synchrotron Radiation Laboratory.

##### (c) Geosciences

The goal of this program is to develop a quantitative and predictive understanding of the energy-related aspects of processes within the earth and at the solar-terrestrial interface. The emphasis is on the upper levels of the earth's crust and the focus is on geophysics and geochemistry of rock-fluid systems and interactions. Specific topical areas receiving emphasis



include: High resolution geophysical imaging; fundamental properties of rocks, minerals, and fluids; scientific drilling; and sedimentary basin systems. The resulting improved understanding and knowledge base are needed to assist efforts in the utilization of the Nation's energy resources in an environmentally acceptable fashion.

#### (d) Engineering Research

This program objectives are: (1) To extend the body of knowledge underlying current engineering practice in order to open new ways for enhancing energy savings and production, prolonging useful equipment life, and reducing costs while maintaining output and performance quality; and (2) to broaden the technical and conceptual base for solving future engineering problems in the energy technologies. Long-term research topics of current interest include: Foundations of bioprocessing of fuels and energy related wastes, fracture mechanics, experimental and theoretical studies of multiphase flows, intelligent machines, and diagnostics and control for plasma processing of materials.

#### (e) Materials Sciences

The objective of this program is to increase the understanding of phenomena and properties important to materials behavior that will contribute to meeting the needs of present and future energy technologies. It is comprised of the subfields metallurgy, ceramics, solid state physics, materials chemistry, and related disciplines where the emphasis is on the science of materials.

#### (f) Advanced Energy Projects

The objective of this program is to support exploratory research on novel concepts related to energy. The concepts may be in any field related to energy but must not fall into an area of programmatic responsibility of an existing ER technical program. The research is usually aimed at establishing the scientific feasibility of a concept and, where appropriate, at estimating its economic viability. The Heavy Ion Fusion Accelerator (HIFAR) program is administered by the Advanced Energy Projects staff. It is an applied research program to develop high-current, heavy ion accelerator technology for evaluation as a driver for inertial confinement fusion.

### 2. Field Operations Management

This office administers special purpose support programs that cut across DOE program areas. In conjunction with this activity, it

supports related conferences, research, and training initiatives that further these areas of interest.

### 3. Office of Fusion Energy

The magnetic fusion energy program is an applied research and development program whose goal is to develop the scientific and technological information required to design and construct magnetic fusion energy systems. This goal is pursued by three divisions, whose major functions are listed below.

#### (a) Applied Plasma Physics (APP)

This Division seeks to develop that body of physics knowledge which permits advancement of the fusion program on a sound basis. APP research programs provide: (1) The theoretical understanding of fusion plasmas necessary for interpreting results from present experiments, and the planning and design of future confinement devices; (2) the data on plasma properties, atomic physics and new diagnostic techniques for operational support of confinement experiments; research and development of heavy ion Fusion Accelerator (HIFAR) and reactor studies in support of the development of Inertial Fusion Energy (IFE).

#### (b) Confinement Systems

This Division has as its primary objective the conduct of research efforts to investigate and resolve basic physics issues associated with medium- to large-scale confinement devices. These devices are used to experimentally explore the limits of specific confinement concepts as well as to study associated physical phenomena. Specific areas of interest include: the production of increased plasma densities and temperatures; the understanding of the physical laws governing plasma energy transport and confinement scaling; equilibrium and stability of high plasma pressure, the investigation of plasma interaction with radio-frequency waves; and the study and control of particle transport in the plasma.

#### (c) Development and Technology

This Division supports research and development of the technology necessary for fabrication and operation of present and future plasma and fusion devices. The program also pursues R&D and system studies pertaining to critical feasibility issues of fusion technology and development.

### 4. Office of Health and Environmental Research

The goals of this research program are as follows: (1) To provide, through basic

and applied research, the scientific information required to identify, understand and anticipate the long-term health and environmental consequences of energy use and development; and (2) to utilize the Department's unique resources to solve major scientific problems in medicine, biology and the environment. The goals of the program are accomplished through the effort of its divisions, which are:

#### (a) Health Effects and Life Sciences Research

This is a broad program of basic applied biological research. The objectives are: (1) To develop experimental information from biological systems for estimating or predicting risks of carcinogenesis, mutagenesis, and delayed toxicological effects associated with low level human exposures to energy-related radiations and chemicals; (2) to define mechanisms involved in the induction of biological damage following exposure to low levels of energy-related agents; (3) to develop new technologies for detecting and quantifying latent health effects associated with such agents; (4) to support fundamental research in structural biology user facilities at DOE laboratories; and (5) to create and apply new technologies and resources for characterizing the molecular nature of the human genome.

Increasing emphasis will be placed on: Understanding of mechanisms by which low level exposures to radiation and/or energy-related chemicals produce long-term health impacts; development of new technologies for estimating human health risks from low levels exposures; development and application of technologies and approaches for cost-effective characterization of the human genome.

#### (b) Medical Applications and Biophysical Research

The objectives of this program comprise two areas: (1) To develop new concepts and techniques for detecting and measuring hazardous physical and chemical agents related to energy production; (2) to evaluate chemical and radiation exposures and dosimetry for health protection application; (3) to determine the physical and chemical mechanisms of radiation action in biological systems; and (4) to develop new instrumentation and technology for biological and biomedical research. The second area is comprised of the nuclear medicine component that is aimed at enhancing the beneficial applications of radiation, radionuclides, and stable isotopes in the diagnosis, study, and



treatment of human diseases. This includes the development of new techniques for stable and radioactive isotope production, labeled pharmaceuticals, imaging devices, and radiation beam applications for the improved diagnosis and therapy of human diseases or the study of human physiological processes. Increased emphasis for the future will be on the development of new isotopes and radiopharmaceuticals for studies of human nutrition, cardiac function, neurological disorders, and disease control.

#### (c) Environmental Sciences

The objectives of the program relate to environmental processes affected by energy production and use. For example, the program develops information on the physical, chemical and biological processes that cycle and transport energy related material and nutrients through the atmosphere, and the ocean margin. Specific emphasis is placed on hydrological transport, mobility and degradation of energy-related contaminants by microorganisms in subsurface systems.

This program also addresses global environmental change from increases in atmospheric carbon dioxide and other greenhouse gases. The scope of the global change program encompasses the carbon cycle, climate modeling and diagnostics, ecosystem responses, the role of the ocean in global change, impacts on resources and experiments to quantify the links between greenhouse gas increases and climate change. A new dimension of this program addresses the role of molecular biology in understanding the ecosystem response to global change.

#### 5. Office of High Energy and Nuclear Physics

This program supports 90% of the U.S. efforts in high energy and nuclear physics. The objectives of these programs are indicated below:

##### (a) Nuclear Physics (Including Nuclear Data Program)

The primary objectives of this program are an understanding of the interactions and structures of atomic nuclei and nuclear matter at the most elementary level possible, and an understanding of the fundamental forces of nature as manifested in nuclear matter.

##### (b) High Energy Physics

The primary objectives of this program are to understand the nature and relationships among fundamental forces of nature and to understand the

ultimate structure of matter in terms of the properties and interrelations of its basic constituents.

#### 6. Scientific Computing Staff

The goal of this program is to advance the understanding of the fundamental concepts of mathematics, statistics, and computer science underlying the complex mathematical models of the key physical processes involved in the research and development programs of DOE. Broad emphasis is given in three major categories: analytical and numerical methods, information analysis techniques, and advanced concepts.

#### 7. Superconducting Super Collider (SSC)

The goals of the Superconducting Super Collider are to build a proton-proton collider with an energy of 20 TeV per beam, to construct and operate experimental systems to study the interactions of these beams, to establish premier international laboratory for high energy physics research, and to create a major resource for science education. The Office of the Superconducting Super Collider administers research grants associated with the SCC Laboratory's physics, accelerator, and associated technology research and development programs.

#### 8. University and Science Education

The Office of University and Science Education supports a variety of science, mathematics and engineering education precollege through postgraduate programs aimed at strengthening the Nation's science education and research infrastructure. DOE's education mission has been expanded to include increasing emphasis on the precollege and general public literacy areas. Much of the support involves the use of the unique resources (scientists, facilities and equipment) at DOE's national laboratories and research facilities, and includes research and/or other "hands-on" opportunities for precollege and postsecondary students, teachers, and faculty members. In addition to programs centered in DOE facilities, a number of other educational activities are supported, including:

##### (a) Pre-Freshman Enrichment Program (PREP)

PREP supports projects at colleges and Universities aimed at seeking out individuals, typically under-represented in science-based careers, during junior high school and early high school years (sixth through tenth grades) and providing these individuals with pre-freshman enrichment activities to identify, motivate and prepare them for science-based careers. Projects must

include concentrated, integrated activities that enhance the student's understanding of science and mathematics, must have a summer component at least four weeks in length, and may also include a pre-summer or post-summer component.

##### (b) Museum Science Education Program

This program funds museum projects that support the development of the media of informal energy-related science education. The media of informal science education include, but are not limited to: Interactive exhibits, demonstrations, hands-on activities, teacher-student curriculum and film/video/software productions. Examples of energy-related subjects include, but are not limited to: High energy and nuclear physics, nuclear science and technologies, global warming, waste management, energy efficiency, new materials development, fossil energy resources, renewable technologies, risk assessment, energy/environment and other timely topics. The purpose of the program is the development and use of creative informal science education media which focus on energy-related science and technology. A minimum of 50% cost-sharing from non-Federal funds is required under this program.

##### (c) University Research Instrumentation Program

The University Research Instrumentation Program has been developed as part of an interagency effort under the coordination of the Office of Science and Technology Policy to help alleviate the overall shortage of sophisticated state-of-the-art instruments required for advanced scientific and technical research at universities. The overall program objective is to assist university and college scientists in strengthening their capabilities to conduct long-range experimental/scientific research in specific energy areas of direct interest to DOE through the acquisition of large scientific/technical pieces of equipment. Only those colleges and universities that currently have DOE funded research projects, which require the requested equipment, totalling at least \$150,000 in the specific area will be selected (more complete eligibility guidelines and principal research areas of particular DOE interest in any given year are available from the program office). Smaller research instruments (less than \$100,000 each) are not eligible for consideration in this program. No specific fraction of cost sharing is required but the level on non-Federal funds to be provided will be considered



in final selection of awards under the program.

(d) **Experimental Program to Stimulate Competitive Research**

The purpose of the DOE Experimental Program to Stimulate Competitive Research is to enhance the capabilities of the eligible designated states to develop science and engineering manpower in energy-related areas and to conduct nationally competitive energy-related research. Planning committees within eligible states may apply for planning, implementation and/or training efforts (list of eligible states and activities to be supported in any given year as well as cost-sharing requirements are available from the program office). Separate applications for planning/implementation and graduate traineeships are required. Planning/implementation applications must contain information that details development of a state-wide improvement plan for energy-related research and human resources, while training grant applications must detail the need for energy-related specific and technical educational disciplines.

(e) **Nuclear Engineering Research**

The objective of this program is to support research efforts aimed at strengthening University-based nuclear engineering programs. Specific areas of basic and applied research of interest include, but are not limited to: (1) Material behavior in a radiation environment typical of advanced nuclear power plants; (2) real-time instrumentation that identifies and applies innovative measurements technologies in nuclear-related fields; (3) advanced nuclear reactor concepts; (4) applied nuclear sciences that address improvements in the applications of radiation and the understanding of the interaction of radiation with matter; (5) engineering science research applicable to advanced nuclear reactor concepts, industry safety and reliability concerns; (6) neutronics that address improvements in reactor computational methodologies and knowledge of the basic fission processes; and (7) nuclear thermal hydraulics that address improvements of models and analysis of thermal hydraulic behavior in an advanced nuclear reactor system.

(f) **Used Energy-Related Laboratory Equipment (ERLE) Program**

In accordance with DOE's responsibility to encourage research and development in the energy area, grants of used energy-related laboratory equipment for use in energy-oriented educational programs in the life,

physical and environmental sciences, and engineering are available to universities, colleges and other non-profit educational institutions of higher learning in the United States. An institution is not required to have a current DOE grant or contract in order to participate in this program. The program office should be contacted for specific information on how to access the list of equipment eligible for grant. The cost of care and handling incident to the grant must be borne by the institution.

9. **The Office of Program Analysis**

The Office of Program Analysis conducts assessments to identify research opportunities in specific areas of interest to DOE programs.

[FR Doc. 92-14626 Filed 6-22-92; 9:46 am]

BILLING CODE 6450-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Parts 21 and 36

[Docket No. 26910; Notice No. 92-7]

RIN 2120-AE50

#### **Alternative Noise Certification Procedure for Normal, Transport, and Restricted Category of Helicopters not Exceeding 6,000 Pounds Maximum Takeoff Weight**

**AGENCY:** Federal Aviation Administration, (DOT).

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This document proposes to add a new appendix to the noise standard regulations. The proposed appendix provides for an alternative noise certification procedure for normal, transport, and restricted category helicopters not exceeding 6,000 pounds maximum takeoff weight. The proposal complements existing helicopter noise requirements and is not an additional regulatory requirement. Applicants for certification may demonstrate compliance with the noise standards of either appendix H or the less costly but more stringent appendix J.

**DATES:** Comments must be submitted on or before July 6, 1992.

**ADDRESSES:** Send comments on this proposal to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 800 Independence Avenue, SW, room 915G, Washington, DC 20591 or deliver comments in triplicate to: FAA Rules Docket, room 915G, 800

Independence Avenue, SW, Washington, DC 20591. Comments may be inspected in room 915G between 8:30 a.m. and 5 p.m., weekdays, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Kenneth E. Jones, Research and Engineering Branch (AEE-110), Technology Division, Office of Environment and Energy, FAA, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3554, facsimile (202) 267-5594.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments and by commenting on the possible environmental, energy, or economic impacts of this proposal. Comments should identify the regulatory docket or notice number and be submitted in triplicate to the address above. All comments received, as well as a report summarizing any substantive public contact with Federal Aviation Administration (FAA) personnel on this rulemaking will be filed in the docket, and will be considered by the Administrator before taking action on this proposed rulemaking. The docket is available for public inspection both before and after the closing date for comments. The FAA will acknowledge the receipt of a comment if the commenter includes a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 26910." When the comment is received by the FAA, the postcard will be dated, time stamped, and returned to the commenter.

#### Availability of the NPRM

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center, APA-230, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267-3474. Requests should be identified by the docket number of this proposed rule. Persons interested in being placed on a mailing list for future notices of proposed rulemaking should also request a copy of Advisory Circular No. 11-2, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.



## Background

### *Helicopter Noise Standards Development: FAA*

On July 9, 1979, the FAA first addressed helicopter noise certification requirements with a notice of proposed rulemaking (NPRM), Notice No. 79-13 (44 FR 42410). After further consideration of the economic impact of the proposed rule, this NPRM was withdrawn (46 FR 61486, December 17, 1981). Because of advances in helicopter noise abatement technology, the FAA again initiated rulemaking action with NPRM No. 86-3 (51 FR 7878, March 6, 1986), which resulted in the present helicopter noise certification standards, part 36, appendix H (53 FR 3534, February 5, 1988). Appendix H was effective upon publication.

Data submitted recently to the International Civil Aviation Organization (ICAO) by various helicopter manufacturers indicates that the cost of an appendix H noise test for a light helicopter can range from \$121,000 to \$239,000. These figures do not include the substantial non-recurring costs for equipment and training. In addition, because the current rule requires that an applicant for a Supplemental Type Certificate (STC) either demonstrate that the modified helicopter is no noisier than the original helicopter, or perform a noise test, the costs associated with helicopter STC's have had an adverse effect on the development of helicopter modifications.

In the 1980's, the United States (with appendix H) and other interested countries adopted a complex and comprehensive helicopter noise test procedure that was previously developed with the support of ICAO. During the development of the ICAO-recommended procedure for the original helicopter noise certification requirements, the relative cost and complexity of the proposed testing procedures were debated as a potential problem for manufacturers of small, low-cost helicopters. Because the majority of civil helicopters produced in the United States are exported, the unilateral adoption by the United States of an additional simplified noise certification procedure for light helicopters would have little practical benefits for the U.S.-manufacturers without the adoption of a similar procedure by foreign countries that would make U.S. manufactured helicopters acceptable to importing nations. Therefore, the United States and other interested countries addressed this issue by participating in the research and development of a

simplified noise certification procedure with the support of ICAO. In this document, the FAA is proposing a similar version to provide immediate regulatory relief to U.S. light helicopter manufacturers and modifiers in anticipation of the formal adoption of the standards proposed by ICAO.

### *Helicopter Standards Development: ICAO*

The current ICAO helicopter noise standards (chapter 8, annex 16) parallel those of the United States. When ICAO adopted its helicopter noise standards in 1985, it recognized that a simple flight test procedure was needed for lighter helicopters. Accordingly, the ICAO committee responsible for formulating noise certification standards, the Committee on Aviation Environmental Protection (CAEP), formed a working group and charged it with the development of a new standard applicable to light helicopters. The product of the working group's efforts, an alternative noise certification procedure for piston-powered helicopters, was amended at the request of the United States during the most recent CAEP meeting (December 1991) to include turbine-powered helicopters and to establish the maximum weight at 6,000 pounds. Compared to the current ICAO standard (chapter 8), the new ICAO chapter 11 standard will: (1) Change the noise metric from Effective Perceived Noise Level (EPN) to Sound Exposure Level (SEL); (2) reduce the required microphone locations from three to one; (3) require only a level flyover test instead of level flyover, approach, and takeoff tests; and (4) reduce the complexity of the data corrections procedures. However, these changes make it impossible to set a limit that is equally stringent for all helicopters. For this reason, it was undesirable to attempt to develop a replacement standard for the existing ICAO chapter 8 standard. Thus, the CAEP decided to develop an alternative standard (ICAO chapter 11) that is simpler to perform, but that has an SEL limit that is more stringent (by two decibels) than the current ICAO chapter 8 EPN limit. After an extensive analysis of existing data, the CAEP set the chapter 11 SEL limit such that it is unlikely that an applicant would pass the newly recommended ICAO chapter 11 standard and yet fail a full ICAO chapter 8 test if the chapter 8 were also performed.

The new ICAO chapter 11 standard was approved by the CAEP during the December 1991 meeting in Montreal, Canada. The CAEP approval was the major hurdle facing the new ICAO

standard. Before formal adoption, the CAEP recommendations must be submitted to the ICAO Council, which in turn will send them to ICAO member States for comment. If member States unanimously concur, the Council will issue the recommended standard. If member States do not concur, the Council will refer the issue to the ICAO Air Navigation Commission (ANC) along with member States's comments. The ANC will review the CAEP recommendations and member States' comments, and make recommendations to the Council, which in turn will send the revisions back to the member States for approval. The ICAO staff estimates that the new ICAO chapter 11 would be formally adopted in November 1993.

### **Synopsis of the Proposal**

Part 36 of the Federal Aviation Regulations (14 CFR) contains noise standards for aircraft type and airworthiness certification. Subpart H and the related appendix H of part 36 prescribe noise levels and test procedures for civil helicopters certificated in the normal, transport, or restricted category, including rules governing the issuance of original, amended, or supplemental type certificates for helicopters for which application is made on or after March 6, 1986.

This proposal would add and reserve a new appendix I, and add a new appendix J to part 36. It would also amend subpart H of part 36 to incorporate the requirements of the new appendix J. The proposed amendments to subpart H and the new requirements of appendix J would not represent additional regulatory requirements, but rather would provide an alternative helicopter noise verification procedure for light helicopters (the term "light helicopters" as used in this preamble refers to helicopters in the normal, transport, or restricted category not exceeding 6,000 pounds maximum certificated takeoff weight) that complements the existing helicopter noise test requirements of appendix H. Compared to the existing appendix H requirements, the procedures under the proposed appendix J are simpler and less costly, but more stringent relative to the existing noise limits under appendix H. An applicant would have the option of certificating a light helicopter under appendix H or the new, less costly but more stringent appendix J. The noise limits prescribed under the proposed appendix J are, on the average, two decibels more stringent than the noise limits prescribed under appendix H. If an applicant fails the more stringent



limits prescribed under appendix J, the applicant would be able to apply for certification under the existing requirements prescribed under appendix H.

The need for this optional certification standard is based on the unanticipated and disproportionate costs to small helicopter manufacturers that are associated with the testing requirements of appendix H.

The following is a section-by-section discussion of the proposed rule.

#### *Section 21.115 Applicable Requirements*

This section sets forth the airworthiness, noise, and fuel venting and exhaust emissions requirements that must be met by each applicant for a supplemental type certificate. Section 21.115(a) would be amended to reinstate a reference to the noise requirements of 14 CFR part 36. This reference was inadvertently removed in recent rulemaking.

#### *Appendix J to Part 36*

Part 36 would be amended by adding the proposed appendix J. Appendix J provides an alternative noise certification procedure for certain civil helicopters certificated in the normal, transport, or restricted category.

The proposed appendix J follows the general outline and all applicable definitions, technical specifications, reference conditions, reference flight procedures, and the specific language of the existing appendix H on a section-by-section basis. If adopted, appendix J would be expected to provide a high degree of commonality between U.S. standards and those expected to be adopted by ICAO and other ICAO member countries. However, subsequent to development of the specifications for the ICAO chapter 11 standard, three technical issues of significance have been identified by the FAA which have led to differences between proposed appendix J and the presently proposed ICAO chapter 11. Chapter 11 does not provide for a correction of off-reference atmospheric attenuation, and does not provide for a correction of off-reference conditions (in particular, ambient temperature) regarding source noise. Also of concern is the chapter 11 provision allowing the use of a strip chart recorder and an "estimation" equation to determine SEL from the duration and the maximum A-weighted level of the noise trace. After review of these three issues, the FAA found the potential errors associated with these three issues to be excessive and contrary to the agency's expectations

regarding the accuracy and integrity of the aircraft noise certification process.

The differences embodied in Appendix J offer significant enhancements to ICAO chapter 11 without altering the intent or character of chapter 11. The changes made to alleviate these problems are consistent with the basic philosophy underlying the original requirement for a simplified noise certification procedure for light helicopters, fits within the present framework of chapter 11, and substantially improves the accuracy of the procedures.

The FAA's reads ICAO chapter 11, section 5.2.1 ("adjustments may be limited to the effects of differences in spherical spreading \* \* \* and "No adjustment for \* \* \* atmospheric attenuation \* \* \* need be applied") as making adjustments for off-reference atmospheric attenuation and off-reference condition regarding source noise optional. If approved by the certifying authority, these adjustments may be performed by the applicant. The FAA's solution in appendix J is to make these corrections mandatory. Appendix J will provide simple procedures for performing such corrections.

The FAA's solution to the source noise problem caused by off-reference temperature is to require an adjustment to the reference airspeed such that the helicopter is flown at the reference advancing blade tip mach number. Such a calculated adjustment to the reference airspeed will be made just prior to the actual flight test and will account for the ambient temperature at the time of the test. This is the procedure proposed by the International Coordinating Council of the Aerospace Industries Associations in their working paper WP/48 presented at the recent CAEP meeting in Montreal (December 1991). A copy of working paper WP/48 is included in the docket.

The FAA's solution to the problem of off-reference atmospheric attenuation is to provide the applicant with a representative one-third octave spectrum which can be used to calculate the appropriate correction. The FAA's analysis of spectra from a wide variety of light helicopter configurations demonstrates that a single averaged spectrum is representative of the spectral shape of light helicopters in general, especially in the spectral bands that are critical in assessing the effects of atmospheric attenuation. Such a representative spectrum is provided in appendix J, or when available, an actual spectrum from prior FAA research efforts may be provided by the FAA to the applicant. The FAA reserves

approval authority over the absorption correction procedure as well as the spectrum used in the correction procedure whether the spectrum used in the procedure is the composite specified in appendix J, a spectrum provided by the FAA from historical data, a historical spectrum provided by the applicant, or actual spectra measured by the applicant during the appendix J noise test. The composite spectrum directly provided in appendix J is derived entirely from light turbine-powered helicopters. If data currently under analysis by the FAA, in conjunction with information provided during the comment period, demonstrates that a typical acoustic spectrum from piston-powered helicopters is significantly different (for purposes of correction for off-reference absorption), the FAA would include in the final rule to include a second composite spectrum for piston helicopters in the specifications provided in appendix J.

Appendix J does not permit the use of a strip chart recorder and an "estimation" equation as an optional method of calculating SEL from maximum level and duration readings taken from the strip chart trace. This method can only be requested by an applicant as an "equivalent procedure" subject to approval of the FAA. Since the FAA's data indicate the error from this measurement method works against the applicant, the FAA will advise all applicants wishing to use such a procedure of the possible errors involved, and will suggest that the applicant choose one of the other readily available SEL-measurement methods specified under appendix J.

The three previously described issues are discussed in detail by letter from the FAA's Office of Environment and Energy to selected CAEP officials. A copy of the letter in question is included in the docket for this rulemaking action.

Appendix J does not retain the appendix H provisions that allow less stringent limits, i.e., Stage 2 + 2 EPNdB, for acoustical changes for Stage 1 helicopters under § 36.11 and section H36.305(a)(1), and that allows similar less stringent limits for the first civil version of a military helicopter under § 36.805(c) and section H36.305(a)(1)(ii). This was done in the interest of harmonization of the United States and ICAO helicopter noise certification regulations. The practical effect of eliminating these provisions is that certain older helicopters will not have the benefit of the more liberal noise limits allowed under appendix H.



For the purpose of demonstrating "no acoustic change" under § 21.93(b), the demonstration must be consistent with the noise certification basis of the parent helicopter. Thus, if the parent helicopter is certified under part 36, appendix H, the "no acoustic change" analysis must consider all three flight configurations (flyover, approach, takeoff). If the parent is certified under part 36, appendix J, the "no acoustic change" analysis may be limited to consideration of flyover noise levels. For purposes of demonstrating "no acoustic change" under § 21.93(b), the noise certification basis of Stage 1 parent helicopter is under appendix H. Subject to the approval of the FAA, the noise certification basis of a helicopter may be changed from appendix H to appendix J through an FAA-approved reanalysis of the original appendix H noise test data or by retesting under the requirements of appendix J. Helicopters that are noise certified under appendix J can be converted to appendix H noise certification only by performing the noise tests prescribed under appendix H.

Sections 36.1, 36.6, 36.801, 36.805, and 36.1581 would also be amended to reference the alternative noise certification procedure contained in the proposed appendix J.

#### Regulatory Impact Evaluation

This section summarizes the draft regulatory evaluation prepared by the FAA on the proposed amendments to 14 CFR part 36—Noise Standards: Aircraft Type and Airworthiness Certification. This summary and the full regulatory evaluation quantify, so the extent practicable, estimated costs to manufacturers, modifiers, and Federal, State, and local governments, as well as anticipated benefits.

Executive Order 12291, February 17, 1981, directs federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The Executive Order requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A "major" rule is one that is likely to result in an annual effect on the economy of \$100 million or more, a major increase in consumer costs, have a significant adverse effect on competition, or that is highly controversial.

The FAA has determined that this proposed rule is not "major" as defined in the Executive Order; therefore, a full regulatory analysis that includes the

identification and evaluation of cost-reducing alternatives to this proposed rule has not been prepared. Instead, the agency has prepared a more concise document termed a regulatory evaluation that analyzes only this proposed rule without identifying alternatives. In addition to a summary of the draft regulatory evaluation, this section also contains a Regulatory Flexibility Determination required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and an International Trade Impact Assessment. If more detailed information is desired, the reader may examine the draft regulatory evaluation contained in the docket.

Under this proposed rule, an applicant seeking certification of a light helicopter would be permitted to choose between two noise certification procedures: Appendix H or proposed appendix J. The new proposed noise certification procedure, appendix J, would: (1) Reduce the required microphone locations from three to one; (2) require only a level flyover test rather than level flyover, approach, and takeoff tests as in appendix H; and (3) reduce the complexity of the data correction procedures. Compared to appendix H, each of these three factors would lower compliance costs.

#### Benefit Analysis

The FAA has determined that this proposed rule would accommodate the advancement of the helicopter manufacturing industry by reducing compliance costs and improving relationships among manufacturers, modifiers, and operators of helicopters, while providing for a reduced level of noise. The following is a discussion of the benefits that would accrue as a result of this proposed rule.

The proposed appendix J noise certification procedure would create a commonality with international standards. The International Civil Aviation Organization (ICAO), Committee on Aviation Environmental Protection, met in December of 1991 in Montreal, Canada, and recommended noise certification standards for light helicopters that are very similar to the U.S. certification procedures contained in this proposed rule.

In July 1991, the FAA conducted a series of acoustic flight tests of 12 helicopter configurations in order to supplement an existing light helicopter noise data base of seven helicopter models. An analysis of the 19 helicopter tests resulted in the establishment of a SEL-based limit under Appendix J that is, on average, 2.0 dB more stringent than the limit each of the 19 helicopters

would have to meet under appendix H.

The more stringent noise certification requirements may foster better relationships between the airports, heliports, local communities, and helicopter operators by providing for quieter helicopters. In some instances, local communities have opposed the establishment of nearby heliports. For example, a zoning request for a heliport to be located just outside of Washington, DC, was denied in the mid-to-late 1980's. Excessive noise was cited as one reason for not granting this request.

In recent years, the number of heliports, helistops, and helipads at airports has increased. In 1987, there were 3,325 heliports in the United States; by the end of 1990, that number had increased to 4,462. As the number of heliports has grown, so has the U.S. helicopter fleet. The FAA estimates that the new alternative procedure would encourage manufacturers to comply with the substantially less costly but more stringent appendix J requirements, and therefore may result in the manufacture of quieter light helicopters.

In addition to the benefits described above, the proposed provisions would result in a cost savings of about \$24 million over the next 15 years. These cost savings result from the difference in complying with proposed appendix J instead of appendix H. Compliance costs for these two appendices are discussed in more detail in the cost section.

#### Costs

This analysis examines the proposed provisions of part 36, appendix J, as if they were a single amendment affecting helicopter manufacturers and modifiers. Normally, each amendment would be considered separately and a distinct economic impact analysis would accompany ngle change: A new light helicopter noise certification procedure that is an alternative to appendix H for manufacturers and modifiers.

The FAA estimates that the manufacturers of light helicopters would have lower one-time noise certification procedure costs. These savings include those primarily associated with the noise abatement technology. The present value cost savings to helicopter manufacturers would be about \$5.43 million over the next 15 years.

A helicopter modifier may concentrate on a particular type of aircraft, and that entity may be in the business of continually developing, selling, and installing modification kits for a



particular type of aircraft. The present value cost savings to helicopter modifiers would be \$17.01 million over the next 15 years. The FAA has examined the impact that this proposed rule would have on helicopter operators, and concludes that there would be no impact on helicopter operators. In addition, the FAA estimates that the agency would have lower costs because less labor would be required to process and witness the new test. On a per-certificate basis, the annual cost savings to the FAA would be about \$12,300. The present value cost savings to the FAA is estimated to be \$1.78 million over the next 15 years.

#### International Trade Impact Analysis

The proposed rule would have little or no impact on trade for either U.S. firms doing business in foreign countries, or foreign firms doing business in the United States. In the U.S. market, foreign manufacturers would have the option of producing helicopters that satisfy the new standards and, therefore, would not be at a competitive disadvantage with U.S. manufacturers.

#### Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 requires agencies to review rules that have "a significant economic impact on substantial number of small entities". The FAA's criteria for "a substantial number" is a number that is not less than 11 and that is more than one-third of the small entities subject to this proposed rule.

According to FAA Order 2100.14A, "Regulatory Flexibility Criteria and Guidance," the definition of a small entity (aircraft and aircraft parts manufacturer) is one with 75 or fewer employees. There are no small U.S. helicopter manufacturers that are manufacturing helicopters for the U.S. market.

Although FAA Order 2100.14A does not specifically identify the aircraft modifiers affected by this rulemaking as an entity type in its lists of threshold criteria, an "aircraft repair facilities" entity is listed in the order. This entity would include repair stations certificated and rated under 14 CFR part 145 and shops employing persons who are holders of a mechanic or repairman certificate issued under 14 CFR part 65 that deal with helicopters. Mechanics employed by such entities may perform maintenance, preventative maintenance, and alteration work as prescribed by § 43.3 of 14 CFR part 43. The corresponding size threshold given in the order is 200 employees.

An aircraft modifier conducts engineering and supplemental type

certificate application activities, and typically performs the alteration work. A modifier also may separately offer repair or maintenance services. The nature of the work performed by a modifier is generally analogous to that of an aircraft repair facility, and the corresponding threshold levels given in the order are assumed to apply here. For the purpose of this regulatory flexibility determination, an aircraft modifier is considered a small entity if it has 200 or fewer employees.

The Order does not define a threshold value for significant annualized cost for the aircraft repair facilities entity. The FAA estimates that the annualized 1991 cost threshold is \$5,400.

Based upon information presented in the cost analysis, the one-time cost savings to a small modifier would be about \$155,290 per supplemental type certificate. Annualized at 10 percent over 10 years, the cost savings would be \$27,270. This is above the annualized cost threshold.

The total population of modifiers is about 200, and in recent years, about 75 of them have applied for supplemental type certificates which require a noise test under 14 CFR part 36. Typically, between 10 to 12 modifiers would initiate a change annually. Using the lower population estimate, about 16 percent ( $12/75=0.16$ ) of the total population of rotocraft modifiers would be affected annually.

The FAA concludes that a substantial number of small entities (more than one third) would not be affected significantly by this proposed rule. Therefore, the proposed rule would not impose a significant economic impact on a substantial number of small entities, and thus, a regulatory flexibility analysis is not required.

#### Federalism Implications

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposed rule would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environmental Analysis

Pursuant to the Department of Transportation "Policies and Procedures for Considering Environmental Impacts" (FAA Order 1050.1D), a draft environmental analysis will be prepared and placed in the docket.

#### Conclusion

For the reasons stated above, I certify that the proposed rule: (1) is not a major rule under Executive Order 12291; (2) is not a significant rule under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact on a substantial number of small entities. In addition, this proposed rule would have little or no impact on trade opportunities for U.S. firms doing business overseas, or on foreign firms doing business in the United States.

#### List of Subjects

##### 14 CFR Part 21

Aircraft, Helicopters, Noise Control.

##### 14 CFR Part 36

Aircraft, Helicopters, Incorporation by reference, Noise control.

#### The Proposed Amendments

Accordingly, the Federal Aviation Administration proposes to amend 14 CFR parts 21 and 36 of the Federal Aviation Regulations as follows:

#### PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

1. The authority citation for part 21 continues to read as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2); 42 U.S.C. 7572; E.O. 11514; 49 U.S.C. 106(g).

2. Section 21.115(a) is revised to read as follows:

##### § 21.115 Applicable requirements.

(a) Each applicant for a supplemental type certificate must show that the altered product meets applicable airworthiness requirements as specified in paragraphs (a) and (b) of § 21.101 and, in the case of an acoustical change describe in § 21.93(b), show compliance with the applicable noise requirements of part 36 of this chapter and, in the case of an emissions change described in § 21.93(c), show compliance with the applicable fuel venting and exhaust emissions requirements of part 34.

\* \* \* \* \*

#### PART 36—NOISE STANDARDS: AIRCRAFT TYPE AND AIRWORTHINESS CERTIFICATION

3. The authority citation for part 36 continues to read as follows:

Authority: 49 U.S.C. 1344, 1348, 1354(a), 1355, 1421, 1423, 1424, 1425, 1428, 1429, 1430, 1431(b), 1651(b)(2), 2121 through 2125; 42



U.S.C. 4321, et seq.; Sec. 124 of Pub. L. 96-473; E.O. 11514, 49 U.S.C. 106(g).

4. Section 36.1 is amended by revising paragraph (h) to read as follows:

**§ 36.1 Applicable and definitions.**

(h) For the purpose of showing compliance with this part, for helicopters in the normal, transport, and restricted categories, the following terms have the specified meanings:

(1) A "Stage 1 noise level" means a takeoff, flyover, or approach noise level greater than the Stage 2 noise limits prescribed in section H36.305 of appendix H of this part, or a flyover noise level greater than the Stage 2 noise limits prescribed in section J36.305 of this part.

(2) A "Stage 1 helicopter" means a helicopter that has not been shown under this part to comply with the takeoff, flyover, and approach noise levels required for Stage 2 helicopters as prescribed in section H36.305 of appendix H of this part, or a helicopter that has not been shown under this part to comply with the flyover noise level required for Stage 2 helicopters as prescribed in section J36.305 of appendix J of this part.

(3) A "Stage 2 noise level" means a takeoff, flyover, or approach noise level at or below the Stage 2 noise limits prescribed in section H36.305 of appendix H of this part, or a flyover noise level at or below the Stage 2 limit prescribed in section J36.305 of appendix J of this part.

(4) A "Stage 2 helicopter" means a helicopter that has been shown under this part to comply with Stage 2 noise limits (including applicable tradeoffs) prescribed in section H36.305 of appendix H of this part, or a helicopter that has been shown under this part to comply with the Stage 2 noise limit prescribed in section J36.305 of appendix J of this part.

5. Section 36.6 is amended by adding a new paragraph (c)(1)(v) to read as follows:

**§ 36.6 Incorporation by reference.**

(c) \* \* \*

(1) \* \* \*

(v) IEC Publication No. 804, entitled "Integrating/Averaging Sound Level Meters," first edition, dated 1985.

6. Section 36.11 is revised to read as follows:

**§ 36.11 Acoustical change: Helicopters.**

This section applies to all helicopters in the normal, transport, and restricted categories for which an acoustical

change approval is applied for under § 21.93(b) of this chapter on or after March 8, 1986. Compliance with the requirements of this section must be demonstrated under appendix H of this part, or, for those helicopters no greater than 6,000 pounds maximum certificated takeoff weight, compliance with this section may be demonstrated under appendix J of this part.

(a) *General requirements.* Except as otherwise provided, for helicopters covered by this section, the acoustical change approval requirements are as follows:

(1) In showing compliance with the requirements of appendix H of this part, noise levels must be measured, evaluated, and calculated in accordance with the applicable procedures and conditions prescribed in parts B and C of appendix H of this part. For those helicopters no greater than 6,000 pounds maximum takeoff weight which alternatively demonstrate compliance under appendix J of this part, the flyover noise level must be measured, evaluated, and calculated in accordance with the applicable procedures and conditions prescribed in parts B and C of appendix J of this part.

(2) Compliance with the noise limits prescribed in section H36.305 of appendix H must be shown in accordance with the applicable provisions of part D of appendix H of this part. For those helicopters that demonstrate compliance with the requirements of appendix J of this part, compliance with the noise levels prescribed in section J36.305 of appendix J must be shown in accordance with the applicable provisions of part D of appendix J of this part.

(b) *Stage 1 helicopters.* Except as provided in § 36.805(c), for each Stage 1 helicopter prior to the change in type design, the helicopter noise levels may not, after the change in type design, exceed the noise levels specified in section H36.305(a)(1) where the demonstration of compliance is under appendix H of this part. The tradeoff provisions under section H36.305(b) may not be used to increase any Stage 1 noise level beyond these limits. If an applicant chooses to demonstrate compliance under appendix J of this part, for each Stage 1 helicopter prior to the change in type design, the helicopter noise levels may not, after the change in type design, exceed the noise levels specified in section J36.305(a) of this part.

(c) *Stage 2 helicopters.* For each Stage 2 helicopter prior to the change in type design, the helicopter must be a Stage 2 helicopter after the change in type design.

7. Section 36.801 is revised to read as follows:

**§ 36.801 Noise measurement.**

For normal, transport, or restricted category helicopters for which certification is sought under appendix H of this part, the noise generated by the helicopter must be measured at the noise measuring points and under the test conditions prescribed in part B of appendix H of this part or under an FAA-approved equivalent procedure. For those normal, transport, and restricted category helicopters with a maximum certificated takeoff weight of 6,000 pounds or less that choose to demonstrate compliance under appendix J, the noise generated by the helicopter must be measured at the noise measuring point and under the test conditions prescribed in part B of appendix J of this part or an FAA-approved equivalent procedure.

8. Section 36.803 is revised to read as follows:

**§ 36.803 Noise evaluation and calculation.**

The noise measurement data required by § 36.801 and obtained under appendix H of this part must be corrected to the reference conditions and evaluated under part C of appendix H of this part or an FAA-approved equivalent procedure. The noise measurement data required by § 36.801 and obtained under appendix J of this part must be corrected to the reference conditions and evaluated under part C of appendix J of this part or an FAA-approved equivalent procedure.

9. Section 36.805 is revised to read as follows:

**§ 36.805 Noise limits.**

(a) Compliance with the noise limits prescribed under part D of appendix H of this part, or under part D of appendix J of this part, must be shown for helicopters for which application for issuance of a type certificate in the normal, transport, or restricted category is made on or after March 8, 1986.

(b) For helicopters covered by this section, except as provided in paragraph (c), it must be shown either (1) for those helicopters demonstrating compliance under appendix H of this part, the noise levels of the helicopters are no greater than the applicable limits prescribed under section H36.305 of appendix H of this part, or (2) for helicopters demonstrating compliance under appendix J of this part, the noise levels of the helicopters are no greater than the applicable limits prescribed under section J36.305 of appendix J of this part.



(c) For helicopters for which application for issuance of an original type certificate in the normal, transport, or restricted category is made on or after March 6, 1986, and which the FAA finds to be the first civil version of a helicopter that was designed and constructed for, and accepted for operational use by, an Armed Force of the United States or the U.S. Coast Guard on or before March 6, 1986, it must be shown that the noise levels of the helicopter are no greater than the noise limits for a change in type design as specified in section H36.305(a)(1)(ii) for compliance demonstrated under appendix H of this part, or as specified in section J36.305 for compliance demonstrated under appendix J of this part. Subsequent civil versions of any such helicopter must meet the Stage 2 requirements.

10. Section 36.1581 is amended by revising paragraph (f) to read as follows:

**§ 36.1581 Manuals, markings, and placards.**

(f) For normal, transport, and restricted category helicopters, if the weight used in meeting the takeoff, flyover, or approach noise requirements of appendix H of this part or the weight used in meeting the flyover noise requirement of appendix J of this part is less than the certificated maximum takeoff weight, established under either §§ 27.25(a) or 29.25(a) of this chapter, that lesser weight must be furnished as an operating limitation in the operating limitations section of the Rotorcraft Flight Manual, in FAA-approved manual material, or on an FAA-approved placard.

11. A new appendix I is added in alphabetical order and reserved as follows:

**Appendix I—[Reserved]**

12. A new appendix J is added in alphabetical order to read as follows:

**Appendix J—Alternative Noise Certification Procedure for Helicopters Under Subpart H Not Exceeding 6,000 Pounds Maximum Certificated Takeoff Weight**

**Part A—Reference Conditions**

- J36.1 *General*
- J36.3 *Reference Test Conditions*
- J36.5 *(Reserved)*

**Part B—Noise Measurement Procedure Under § 36.801**

- J36.101 *Noise certification test and measurement conditions*
- J36.103 *(Reserved)*
- J36.105 *Flyover test conditions*

- J36.107 *(Reserved)*
- J36.109 *Measurement of helicopter noise received on the ground*
- J36.111 *Atmospheric attenuation of sound*

**Part C—Noise Evaluation and Calculation Under § 36.803**

- J36.201 *Noise evaluation in SEL*
- J36.203 *Calculation of noise levels*
- J36.205 *Detailed data correction procedures*

**Part D—Noise Limits Procedure Under § 36.805**

- J36.301 *Noise measurement, evaluation, and calculation*
- J36.303 *(Reserved)*
- J36.305 *Noise limits*

**Part A—Reference Conditions**

**Section J36.1 General.**

This appendix prescribes the alternative noise certification requirements identified under § 36.1 and subpart H for helicopters in the normal, transport, and restricted categories no greater than 6,000 pounds maximum certificated takeoff weight including:

- (a) The conditions under which an alternative noise certification test under Subpart H must be conducted and the alternative measurement procedure that must be used under § 36.801 to measure the helicopter noise during the test;
- (b) The alternative procedures which must be used under § 36.803 to correct the measured data to the reference conditions and to calculate the noise evaluation quantity designated as Sound Exposure Level (SEL); and
- (c) The noise limits for which compliance must be shown under § 36.805.

**Sec. J36.3 Reference Test Conditions**

(a) *Meteorological conditions.* The following are the noise certification reference atmospheric conditions which shall be assumed to exist from the surface to the helicopter altitude:

- (1) Sea level pressure of 2116 pounds per square foot (76 centimeters mercury);
- (2) Ambient temperature of 77 degrees Fahrenheit (25 degrees Celsius);
- (3) Relative humidity of 70 percent; and
- (4) Zero wind.

(b) *Reference test site.* The reference test site is flat and without line-of-sight obstructions across the flight path that encompasses the 10 dB down points of the A-weighted time history.

(c) *Level flyover reference profile.* The reference flyover profile is a level flight 492 feet (150 meters) above ground level as measured at the noise measuring station. The reference flyover profile has a linear flight track and passes directly over the noise monitoring station. Airspeed is stabilized at 0.9V<sub>H</sub>; 0.9V<sub>NE</sub>; 0.45V<sub>H</sub> + 65 kts (0.45V<sub>H</sub> + 120 km/h); or 0.45V<sub>NE</sub> + 65 kts (0.45V<sub>NE</sub> + 120 km/h), whichever speed is less. Rotor speed is stabilized at the maximum continuous RPM throughout the 10 dB down time period.

(1) For noise certification purposes, V<sub>H</sub> is defined as the airspeed in level flight obtained using the minimum specified engine power corresponding to maximum continuous power available for sea level, 77 degree

Fahrenheit (25 degrees Celsius) ambient conditions at the relevant maximum certificated weight. The value of V<sub>H</sub> thus defined must be listed in the Rotorcraft Flight Manual.

(2) V<sub>NE</sub> is the never-exceed airspeed.

(d) The weight of the helicopter shall be the maximum takeoff weight (internal load) at which noise certification is requested.

**Sec. J36.5 (Reserved)**

**Part B—Noise Measurement Procedure Under Section 36.801**

**Sec. J36.101/Noise certification test and measurement conditions**

(a) *General.* This section prescribes the conditions under which helicopter noise certification tests must be conducted and the measurement procedures that must be used to measure helicopter noise during each test.

(b) *Test site requirements.* (1) The noise measuring station must be surrounded by terrain having no excessive sound absorption characteristics, such as might be caused by thick, matted, or tall grass, shrubs, or wooded areas.

(2) During the period when the flyover noise measurement is within 10 dB of the maximum A-weighted sound level, no obstruction that significantly influences the sound field from the helicopter may exist within a conical space above the noise measuring position (the point on the ground vertically below the microphone), the cone is defined by an axis normal to the ground and by half-angle 80 degrees from this axis.

(c) *Weather restrictions.* The tests must be conducted under the following atmospheric conditions:

- (1) No rain or other precipitation;
- (2) Ambient air temperature between 36 degrees and 95 degrees Fahrenheit (2 degrees and 35 degrees Celsius), inclusively;
- (3) Relative humidity between 20 percent and 95 percent inclusively;
- (4) Wind velocity that does not exceed 10 knots (19 km/h) and a crosswind component that does not exceed 5 knots (9 km/h). The wind shall be determined using a continuous averaging process of no-greater-than 30 seconds;
- (5) Unless otherwise approved by the FAA, ambient temperature must be measured at the noise measuring station at a height above the ground of 33 feet (10 meters) and relative humidity, wind speed, and wind direction must be measured at the noise monitoring station at a height above the ground of 4 feet (1.2 meters);
- (6) No anomalous wind conditions (including turbulence) which will significantly affect the noise level of the helicopter when the noise is recorded at the noise measuring station; and
- (7) The location of the meteorological instruments must be approved by the FAA as representative of those atmospheric conditions existing near the surface over the geographical area where the helicopter noise measurements are made. In some cases, a fixed meteorological station (such as those found at airports or other facilities) may meet this requirement



(d) *Helicopter testing procedures.* (1) The helicopter testing procedures and noise measurements must be conducted and processed in a manner which yields the noise evaluation measure designated Sound Exposure Level (SEL) as defined in section J36.109(b) of this appendix.

(2) The helicopter height relative to the noise measurement point sufficient to make corrections required under section J36.205 of this appendix must be determined by an FAA-approved method that is independent of normal flight instrumentation, such as radar tracking, theodolite triangulation, laser trajectory, or photographic scaling techniques.

(3) When it is shown by the applicant that the design characteristics of the helicopter would prevent flight being conducted in accordance with the reference test conditions prescribed under section J36.3, the reference test conditions used under this appendix shall be permitted to depart from the standard reference test conditions, with the approval of the FAA, but only to the extent demanded by those design characteristics which make compliance with the reference test conditions impossible.

#### Section J36.103 (Reserved)

#### Section J36.105 Flyover test conditions

(a) This section prescribes the flight test conditions and allowable random deviations for flyover noise tests conducted under this appendix.

(b) A test series must consist of at least six flights (three with a headwind component, if appropriate and three with a tailwind component, if appropriate) over the noise measuring station:

(1) In level flight and in cruise configuration;

(2) At a height of 492 feet  $\pm$  50 feet (150  $\pm$  15 meters) above the ground level at the noise measuring station; and

(3) Within  $\pm$  10 degrees from the zenith.

(c) Each flyover noise test must be conducted:

(1) At the reference airspeed specified in Section J36.3(c), with such airspeed adjusted as necessary to produce the same advancing blade tip Mach number as associated with the reference conditions;

(i) Advancing blade tip mach number ( $M_{AT}$ ) is defined as the ratio of the arithmetic sum of blade tip rotational speed ( $V_R$ ) and the helicopter translational speed ( $V_T$ ) over the speed of sound ( $c$ ) at 77 degrees Fahrenheit (1135.6 ft/sec or 346.13 m/sec) such that  $M_{AT} = (V_R + V_T)/c$ ; and

(ii) The airspeed shall not vary from the adjusted reference airspeed by more than  $\pm 3$  knots ( $\pm 5$  km/hr) or an equivalent FAA-approved variation from the reference advancing blade tip mach number. The adjusted reference airspeed shall be maintained throughout the measured portion of the flyover.

(2) At rotor speed stabilized at the normal operating rotor RPM ( $\pm 1$  percent); and

(3) With the power stabilized during the period when the measured helicopter noise level is within 10 dB of the maximum A-weighted sound level ( $L_{Amax}$ ).

(d) The helicopter test weight for each flyover test must be within plus 5 percent or

minus 10 percent of the maximum takeoff weight for which certification under this part is requested. At least one flyover test in the flyover test series must be conducted at a test weight at or above the maximum takeoff weight for which certification under this part is requested.

(e) The requirements of paragraph (b)(2) of this section notwithstanding, flyovers at an FAA-approved lower height may be used and the results adjusted to the reference measurement point by an FAA-approved method if the ambient noise in the test area, measured in accordance with the requirements prescribed in section J36.109, is found to be within 15 dB(A) of the maximum A-weighted helicopter noise level ( $L_{Amax}$ ) measured at the noise measurement station in accordance with section J36.109.

#### Sec. J36.107 (Reserved)

#### Sec. J36.109 Measurement of helicopter noise received on the ground

(a) *General.* (1) The helicopter noise data measured under this appendix for noise certification purposes must be obtained with FAA-approved acoustical equipment and

(2) Paragraph (b) of this section identifies and prescribes the specifications for the noise evaluation measure required under this appendix. Paragraphs (c) and (d) prescribe the required acoustical equipment specifications. Paragraphs (e) and (f) prescribe the calibration and measurement procedures required under this appendix.

(d) *Noise unit definition.* (1) The value of sound exposure level (SEL), or as denoted by symbol,  $L_{AE}$ , is defined as the level, in decibels, of the time integral of squared 'A'-weighted sound pressure ( $P_A$ ) over a given time period or event, with reference to the square of the standard reference sound pressure ( $P_0$ ) of 20 micropascals and a reference duration of one second.

(2) This unit is defined by the expression:

$$L_{AE} = 10 \log_{10} \frac{1}{T_0} \int_{t_1}^{t_2} \left( \frac{P_A(t)}{P_0} \right)^2 dt \quad \text{dB}$$

Where  $T_0$  is the reference integration time of one second and ( $t_2 - t_1$ ) is the integration time interval.

(3) The integral equation of paragraph (b)(2) of this section can also be expressed as:

$$L_{AE} = 10 \log_{10} \frac{1}{T_0} \int_{t_1}^{t_2} 10^{0.1 L_A(t)} dt \quad \text{dB}$$

Where  $L_A(t)$  is the time varying A-weighted sound level.

(4) The integration time ( $t_2 - t_1$ ) in practice shall not be less than the time interval during which  $L_A(t)$  first rises to within 10 dB(A) of its

maximum value ( $L_{Amax}$ ) and last falls below 10 dB(A) of its maximum value.

(c) *Measurement system.* The acoustical measurement system must consist of FAA-approved equipment equivalent to the following:

(1) A microphone system with frequency response that is compatible with the measurement and analysis system accuracy prescribed in paragraph (d) of this section;

(2) Tripods or similar microphone mountings that minimize interference with the sound energy being measured;

(3) Recording and reproducing equipment with characteristics, frequency response, and dynamic range that are compatible with the response and accuracy requirements of paragraph (d) of this section; and

(4) Calibrators using sine wave, or pink noise, of known levels. When pink noise (defined in section H36.109(e)(1)) is used, the signal must be described in terms of its root-mean-square (rms) value.

(d) *Sensing, recording, and reproducing equipment.* (1) The noise levels measured from helicopter flyovers under this appendix analysis.

(i) The SEL values from each flyover test may be directly determined from an integrating sound level meter complying with the Standards of the International Electrotechnical Commission (IEC) Publication No. 804, "Integrating and Averaging Sound Level Meters," incorporated by reference under § 36.6 of this part, for a Type 1 instrument set at "slow" response.

(ii) The acoustic signal from the helicopter, along with the calibration signals specified under paragraph (e) of this section and the background noise signal required under paragraph (f) of this section may be recorded on a magnetic tape recorder for subsequent analysis by an integrating sound level meter identified under paragraph (d)(1)(i) of this section. The record/playback system (including tape) of the tape recorder must conform to the requirements prescribed under section H36.109(c)(3) of appendix H of this part. The tape recorder shall comply with specifications of IEC Publication No. 561, "Electro-acoustical Measuring Equipment for Aircraft Noise Certification," dated 1976.

(iii) The characteristics of the complete system shall comply with the recommendations given in IEC Publication No. 651, "Sound Level Meters," with regard to the specifications concerning microphone, amplifier, and indicating instrument characteristics.

(iv) The response of the complete system to a sensibly plane progressive wave of constant amplitude shall lie within the tolerance limits specified in Table IV and Table V for Table 1 instruments in IEC Publication No. 651, for weighting curve "A" over the frequency range of 45 Hz to 11500 Hz.

(v) A windscreen must be used with the microphone during each measurement of the helicopter flyover noise. Correction for any insertion loss produced by the windscreen, as a function of the frequency of the acoustic calibration required under paragraphs (e) and (f) of this section, must be applied to the



measured data and any correction applied must be reported.

(e) *Calibrations.* (1) If the helicopter acoustic signal is tape recorded for subsequent analysis, the measuring system and components of the recording system must be calibrated as prescribed under section H36.109(e) of appendix H of this part.

(2) If the helicopter acoustic signal is directly measured by an integrating sound level meter:

(i) The overall sensitivity of the measuring system shall be checked before and after the series of flyover tests and at intervals (not exceeding one-hour duration) during the flyover tests using an acoustic calibrator generating a known sound pressure level at a known frequency.

(ii) The performance of equipment in the system will be considered satisfactory if, during each day's testing, the variation in the calibration value does not exceed 9.5 dB. The SEL data collected during the flyover tests shall be adjusted to account for any variation in the calibration value.

(iii) A performance calibration analysis of each piece of calibration equipment, including pistonphones, preference microphones, and voltage insertion devices, must have been made during the six calendar months proceeding the beginning of the helicopter flyover series. Each calibration shall be traceable to the National Institute of Standards and Technology.

(f) *Noise measurement procedures.* (1) The microphone shall be of the pressure-sensitive capacitive type designed for nearly uniform grazing incidence response. The microphone shall be mounted with the center of the sensing element 4 feet (1.2 meters) above the local ground surface and shall be oriented for grazing incidence such that the sensing element, the diaphragm, is substantially in the plane defined by nominal flight of the helicopter and the noise measurement station.

(2) Immediately prior to and after each test series, a recorded acoustic calibration of the system must be made in the field with an acoustic calibrator for the purposes of checking system sensitivity and providing an acoustic reference level for the analysis of the sound level data. If a tape recorder is used, the frequency response of the electrical system must be determined at a level within 10 dB of the full-scale reading used during the test, utilizing pink or pseudorandom noise.

(3) The ambient noise, including both acoustical background and electrical noise of the measurement systems shall be determined in the test area and the system gain set at levels which will be used for helicopter noise measurements. If helicopter sound levels do not exceed the background sound levels by at least 15 dB(A), flyovers at an FAA-approved lower height may be used and the results adjusted to the reference measurement point by an FAA-approved method.

(4) If an integrating sound level meter is used to measure the helicopter noise, the instrument operator shall monitor the continuous A-weighted (slow response) noise levels throughout each flyover to ensure that the SEL integration process includes, at minimum, all of the noise signal between the

maximum A-weighted sound level ( $L_{Amax}$ ) and the 10 dB down points in the flyover time history. The instrument operator shall note the actual dB(A) levels at the start and stop of the SEL integration interval and document these levels along with the value of  $L_{Amax}$  and the integration interval (in seconds) for inclusion in the noise data submitted as part of the reporting requirements under section J36.111(b).

#### Sec. J36.111/Reporting requirements

(a) *General.* Data representing physical measurements, and corrections to measured data, including corrections to measurements for equipment response deviations, must be recorded in permanent form and appended to the record. Each correction is subject to FAA approval.

(b) *Data reporting.* After the completion of the test the following data must be included in the test report furnished to the FAA:

(1) Measured and corrected sound levels obtained with equipment conforming to the standards prescribed in section J36.109 of this appendix;

(2) The type of equipment used for measurement and analysis of all acoustic, aircraft performance and flight path, and meteorological data;

(3) The atmospheric environmental data required to demonstrate compliance with this appendix, measured throughout the test period;

(4) Conditions of local topography, ground cover, or events which may interfere with the sound recording;

(5) The following helicopter information:

(i) Type, model, and serial numbers, if any, of helicopter, engine(s) and rotor(s).

(ii) Gross dimensions of helicopter, location of engines, rotors, and the helicopter acoustic reference point, and number of blades for each rotor.

(iii) Any modifications or non-standard equipment likely to affect the noise characteristics of the helicopter.

(iv) Maximum takeoff weight for which certification under this appendix is requested.

(v) Aircraft configuration, including landing gear positions.

(vi)  $V_H$  or  $V_{NE}$  (whichever is less) and the adjusted reference airspeed.

(vii) Aircraft gross weight for each test run.

(viii) Indicated and true airspeed for each test run.

(ix) Ground speed, if measured, for each run.

(x) Helicopter engine performance as determined from aircraft instruments and manufacturer's data, and

(xi) Aircraft flight path above ground level, referenced to the elevation of the noise measurement station, in feet, determined by an FAA-approved method which is independent of normal flight instrumentation, such as radar tracking, theodolite triangulation, laser trajectory, or photostereographic techniques.

(6) Helicopter speed, position, and engine performance must be recorded at an FAA-approved sampling rate.

#### Sec. J36.113 Atmospheric attenuation of sound

(a) Each SEL value measured in accordance with the requirements prescribed

in section J36.109 must conform, or be corrected to, the reference meteorological conditions prescribed under section J36.3(a). Such corrections must account for any differences in the atmospheric attenuation of sound between the test-day conditions and the reference day conditions along the sound propagation path between the helicopter when directly over the noise measuring station and the microphone.

(b) The atmospheric attenuation rates of sound with distance for each of the 24 contiguous one-third octave bands between the geometric mean frequencies of 50 Hz and 10,000 Hz inclusively, must be determined in accordance with the formulations and tabulations of SAE ARP 866A, entitled "Standard Values of Atmospheric Absorption as a Function of Frequency and Temperature for Use in Evaluation Aircraft Flyover Noise." The one-third octaves must conform to the recommendations of International Electrotechnical Commission (IEC) Publication No. 225, entitled "Octave, Half-Octave, and Third Octave Band Filters Intended for Analysis of Sounds and Vibrations."

(c) With the approval of the FAA, the relative A-weighted spectrum shape represented by the one-third octave sound levels shown as follows may be used as representative of the maximum A-weighted one-third octave spectrum of the test helicopter for purposes of performing the atmospheric attenuation corrections prescribed under section J36.205(c) of this appendix:

Band	Frequency	Level
17	50	34.7
18	63	34.0
19	80	38.4
20	100	40.5
21	125	48.2
22	160	59.6
23	200	54.7
24	250	61.2
25	315	64.4
26	400	63.2
27	500	63.0
28	630	63.0
29	800	60.9
30	1000	60.5
31	1250	59.8
32	1600	58.8
33	2000	58.1
34	2500	56.9
35	3150	54.7
36	4000	51.5
37	5000	48.0
38	6300	44.6
39	8000	39.3
40	10000	31.6

The proceeding spectrum is corrected to 77 degrees Fahrenheit (25 degrees Celsius) and 70 percent relative humidity, and is valid for a propagation distance of 492 feet  $\pm$  50 feet. The overall A-weighted sound level,  $L_{A(c)}$ , of the proceeding corrected spectrum is 72.33 dB(A).



## Part C—Noise Evaluation and Calculation Under Section 36.803

### Sec. 36.201 Noise evaluation in SEL

The noise evaluation measure shall be the sound exposure level (SEL) in units of dB(A) as prescribed under section 36.109(b) of this appendix. The SEL value of each flyover may be directly determined by use of an integrating sound level meter. Specifications for the integrating sound level meter and requirements governing the use of such instrumentation are prescribed under section 36.109 of this appendix.

### Sec. 36.203 Calculation of noise levels

(a) To demonstrate compliance with the noise level limits specified under section 36.305 of this appendix, the SEL noise levels from each valid flyover, corrected as necessary to reference conditions under section 36.205 of this appendix, must be arithmetically averaged to obtain a single SEL dB(A) mean value for the flyover series. No individual flyover run may be omitted from the averaging process, unless otherwise specified or approved by the FAA.

(b) The minimum sample size acceptable for the helicopter flyover certification measurements is six. The number of samples must be large enough to establish statistically a 90 percent confidence limit that does not exceed  $\pm 1.5$  dB(A).

(c) All data used and calculations performed under this section, including the calculated 90 percent confidence limits, must be documented and provided under the reporting requirements of section 36.111 of this appendix.

### Sec. 36.205 Detailed data correction procedures

(a) When certification test conditions measured under part B of this appendix differ from the reference test conditions prescribed under section 36.3 of this appendix, appropriate adjustments shall be made to the measured noise data in accordance with the methods set out in paragraphs (b), (c), and (d) of this section. At minimum, appropriate adjustment shall be made for off-reference altitude and atmospheric attenuation, and for the difference between reference airspeed and adjusted reference airspeed.

(b) The adjustment for off-reference altitude may be approximated from:

$$\langle \Delta \rangle J_1 = 12.5 \log_{10} (H_T/492) \text{ dB};$$

where  $\langle \Delta \rangle J_1$  is the quantity in decibels that must be algebraically added to the measured SEL noise level to correct for an off-reference flight path.  $H_T$  is the height, in feet, of the test helicopter when directly over the noise measurement point, and the constant (12.5) accounts for the effects on spherical spreading and duration from the off-reference altitude.

(c) Corrections prescribed under section 36.113 of the difference in atmospheric attenuation between reference and test meteorological conditions are made by the following calculation procedure, or may be made by an approved FAA equivalent procedure:

(1) If the reference spectrum specified in section 36.113(c) or an alternative reference spectrum is approved by the FAA as

representative of the test helicopter noise signature at reference conditions, the following calculation is required to effectively correct for the difference between reference and test day atmospheric attenuation:

$$\langle \Delta \rangle J_2 = L_{A(am)} - L_{A(R)} \text{ dB};$$

where  $\langle \Delta \rangle J_2$  is the quantity, in decibels, must be algebraically added to the measured SEL noise level.  $L_{A(R)}$  and  $L_{A(am)}$  are defined respectively, in (c)(2) and (c)(3) of this paragraph.

(2)  $L_{A(R)}$  is the reference A-weighted sound level resulting from the summation of the contiguous one-third octave A-weighted sound levels over the range of geometric mean frequencies of 50 Hz to 10,000 Hz (band nos. 17 through 40) of a relative helicopter noise spectrum approved by the FAA as representative of the flyover noise signature at the noise measurement station of the test helicopter operating at reference conditions of airspeed, altitude, temperature, and relative humidity.  $L_{A(R)}$  is noise signature at the noise measurement station of the test helicopter operating at reference conditions of airspeed, altitude, temperature, and relative humidity.  $L_{A(R)}$  is calculated by the equation:

$$L_{A(R)} = 10 \log_{10} \sum_{i=1}^{24} 10^{0.1 L_{Ai(am)}} \text{ dB}$$

where  $L$  is the A-weighted sound level at reference conditions for the  $i$ (th) band of the 24 contiguous third-octave bands.

(3)  $L_{A(am)}$  is the "as measured" A-weighted sound level resulting from the summation of the 24 contiguous one-third octave A-weighted sound levels over the range of geometric mean frequencies of 50 Hz to 10,000 Hz (band nos. 17 to 40) of the representative flyover noise signature at the noise measuring station of the test helicopter operating at reference conditions of airspeed and altitude, and operating under test day conditions of temperature and relative humidity.  $L_{A(am)}$  is calculated from the equation:

$$L_{A(am)} = 10 \log_{10} \sum_{i=1}^{24} 10^{0.1 L_{Ai(R)}} \text{ dB}$$

Where  $L_{A(am)}$  is the "as measured" A-weighted sound level at test day conditions of temperature and relative humidity, for the  $i$ (th) band of the 24 contiguous one-third octave bands and is to be calculated from each of the reference one-third octave bands as follows:

$$L_{A(am)} = L_{A(R)} + 0.49(a_1 - a_{1R}) \text{ dB};$$

Humidity,  $a_{1R}$  is the atmospheric absorption rate in dB/1000 ft specified under section 36.113(b) for the  $i$ (th) one-third octave band at reference conditions of 77 degrees Fahrenheit (25 degrees Celsius) and 70 percent relative humidity, and the constant (0.49) is derived from the expression  $H_T/1000$

(ft) where the value of  $H_T$  is the reference helicopter height of 492 feet over the noise measuring station.

(4) If the reference spectrum specified under section 36.113(c) is approved for use by the FAA, the value of 72.33 dB for the variable  $L_{A(R)}$  is used in the equation for  $\langle \Delta \rangle J_2$  under (c)(1) of this paragraph, and the reference one-third octave values specified under section 36.113(c) must be used in the equation for  $L_{A(am)}$  under (c)(3) of this paragraph.

(5) If a reference spectrum other than the spectrum specified under section 36.113(c) is required or approved for use by the FAA, the value for  $L_{A(R)}$  for the alternative spectrum must be calculated by the equation specified under paragraph (c)(2) of this section, and the alternative reference values of  $L_{A(R)}$  must be used in the calculation specified under paragraph (c)(3) of this section.

(d) The adjustment for the difference between reference airspeed and adjusted reference airspeed calculated from:

$$\langle \Delta \rangle J_3 = 10 \log_{10} (V_{RA}/V_R) \text{ dB};$$

Where  $\langle \Delta \rangle J_3$  is the quantity in decibels that must be algebraically added to the measured SEL noise level to correct for the influence of the adjustment of the reference airspeed on the duration of the measured flyover event as perceived at the noise measurement station,  $V_R$  is the reference airspeed as prescribed under section 36.3(c) of this appendix, and  $V_{RA}$  is the adjusted reference airspeed as prescribed under section 36.105(c) of this appendix.

(e) No correction for source noise during the flyover other than the variation of source noise accounted for by the adjustment of the reference airspeed prescribed for under section 36.105(c) need be applied.

(f) No correction for the difference between the reference ground speed and the actual ground speed need be applied.

(g) The net value for all adjustments for differences between test and flight procedures shall not exceed  $\pm 2.0$  dB(A) unless another net value is approved by the FAA.

(h) All data used and calculations performed under this section must be documented and provided under the reporting requirements specified under section 36.111 of this appendix.

## Part D—Noise Limits Procedure Under Section 36.805

### Sec. 36.301/Noise measurement, evaluation, and calculation

Compliance with this part of this appendix must be shown with noise levels measured, evaluated, and calculated as prescribed under parts B and C of this appendix.

### Sec. 36.303/(Reserved)

### Sec. 36.305/Noise limits

For compliance with this appendix, the calculated noise levels of the helicopter, at the measuring point described in section 36.101 of this appendix, must be shown to not exceed the following (with appropriate interpolation between weights):

(a) Stage 1 noise limits for acoustical changes for helicopters are the same limits as



prescribed for Stage 2 limits under paragraph (b) of this section.

(b) For normal, transport, and restricted category helicopters no greater than 6,000 pounds maximum certificated takeoff weight and noise tested under this appendix, the Stage 2 noise limit is 82 decibels SEL for helicopters with maximum certificated takeoff weight at which the noise certification is requested, of up to 1,764 pounds and increasing at a rate of 3.01 decibels per doubling of weight thereafter. The limit may be calculated by the equation:  $SEL_{LJM} = 49.535 + 10 \log_{10}(MTOW)$  where MTOW is the maximum takeoff weight, in pounds, for which certification under this appendix is requested.

(c) The procedure shall be done in accordance with the International Electrotechnical Commission IEC Publication No. 804, entitled "Integrating/averaging Sound Levels Meters," First Edition, dated 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the Bureau Central de la Commission Electrotechnique Internationale, 1, rue de Varembe, Geneva, Switzerland or the American National Standard Institute, 1430 Broadway, New York City, New York 10018, and can be inspected at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

Issued in Washington, DC on June 18, 1992.

Robert B. Hixson,

Acting Director, Office of Environment and Energy.

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1915

[Docket No. S-050]

RIN 1218-AA91

### Explosive and Other Dangerous Atmospheres in Vessels and Vessel Sections

**AGENCY:** Occupational Safety and Health Administration (OSHA), Department of Labor.

**ACTION:** Proposed rule; reopening of record for advisory committee recommendations and public comments.

**SUMMARY:** On November 29, 1988, OSHA published a proposed rule that would revise its shipyard employment safety standards for explosive and dangerous atmospheres in vessels and vessel sections (subpart B, 53 FR 48092). The proposed standards addressed safe entry into and work to be carried on in confined spaces on board vessels and

vessel sections in shipyards. Although over 40 comments were received in response to the proposal, none of the commenters made a request for a hearing. Subsequently, after the closing date for comments on this proposed shipyard rule, OSHA also proposed new rules for confined spaces in general industry (§ 1910.146) (54 FR 24080, June 5, 1989), which elicited almost 300 comments. The general industry proposal covered land-side (that is, other than shipboard or pier-side) confined spaces in shipyards, including all operations and work areas such as fabricating shops, machine shops, and staging areas.

A short time after the November 1988 publication of the proposed rule on confined spaces in vessels and vessel sections, the Shipyard Employment Standards Advisory Committee (SESAC), which was established to provide OSHA with guidance in consolidating its shipyard standards with its general industry standards and updating the standards applicable to shipyards, held its first meeting. The Committee was asked to consider both sets of proposed confined space rules with a view to application in shipyards. SESAC discussed the proposed rules and formed a working subgroup to consider the issue. The subgroup recommended and the full committee agreed that the scope of the proposed subpart B should be expanded to cover all land-side confined space situations in the shipyard. SESAC also recommended adding proposed regulatory language to subpart B to address training, rescue, and the duty to other employers (Tr. 101, 4/25/90).

In light of various comments submitted to the docket concerning the general industry confined spaces proposal, and in order for OSHA to insert SESAC's recommendations into the rulemaking record and to clarify additional issues, the Agency is reopening for comment the record on proposed subpart B. This additional period will allow further public comment and serve to augment the record that has been established for the November 1988 proposal.

**DATES:** Comments. Interested persons are invited to submit written data, views and arguments on the issues raised in this document in quadruplicate to the address listed below. Comments must be postmarked by September 22, 1992.

**ADDRESSES:** Comments. Comments on the issues raised in this notice must be submitted in quadruplicate to the Docket Officer, Docket S-050, U.S. Department of Labor, Occupational Safety and Health Administration, room N-2625,

200 Constitution Avenue NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Mr. James F. Foster, U.S. Department of Labor, Occupational Safety and Health Administration, room N-3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 523-8151.

### SUPPLEMENTARY INFORMATION:

#### I. Background

On November 29, 1988, OSHA published a proposed rule in the *Federal Register* (53 FR 48092) that would revise its existing standards on Explosive and Other Dangerous Atmospheres in vessels and Vessel Sections, which are codified in subpart B of 29 CFR part 1915. The proposed standards addressed safe entry into and work to be carried on in confined spaces on board vessels and vessel sections in shipyards. The provisions in the November 1988 (subpart B) proposal addressed the following: Increasing the oxygen content required for unprotected confined space entry from 16.5 percent by volume to 19.5 percent by volume; changing the sequence of testing to reflect actual practice so that oxygen, flammability, and toxicity are tested in that order requiring skilled personnel to test the ship's compartments prior to human occupancy and starting work; delineating the conditions for safely performing hot work in confined spaces; and eliminating duplicative paperwork requirements. Interested persons were given until February 27, 1989, to submit comments with respect to the proposal, to file objections, and to request a hearing. OSHA received over 40 comments in response to the proposed rulemaking. There were no hearing requests.

A short time after the shipyard proposed rule (subpart B) was published, the Shipyard Employment Standards Advisory Committee (SESAC) was established to provide OSHA with guidance in revising its shipyard standards and developing a vertical standard for the shipyard industry. At several SESAC meetings, the proposed rules in subpart B were on the agenda.

Subsequently, several months after the comment period closed for the proposed rule on 29 CFR part 1915, subpart B, OSHA published the proposed rule for confined spaces (that is, permit spaces) in general industry (54 FR 24080, June 5, 1989), which was also to apply to land-side (that is, other than shipboard or pier-side) operations within shipyards, including all operations and work areas such as



fabricating ships, machine shops, and staging areas. The general industry confined space (permit space) proposal was also discussed at some SESAC meetings with a view toward incorporating applicable requirements into a vertical confined space standard for the entire shipyard. At SESAC's meeting of April 25-26, 1990, following the presentation from an informal subgroup that took the proposed general industry confined space (permit space) standards into account and developed recommended additions to the proposed shipyard standards on this issue, the Committee recommended that the scope of the proposed shipyard standard on vessels and vessel sections be expanded to include all confined-space operations within the shipyard (Tr. 102, 4/25/90). Moreover, in agreement with a number of the subgroup's suggestions, SESAC recommended that subpart B also address training, rescue, and the duty to other employers.

OSHA believes that the changes recommended by SESAC are significant and should be considered in developing final confined space rules applicable to shipyards. Therefore, the following recommended changes are set out for public comment.

SESAC recommended that the scope of subpart B (§ 1915.11(a)) be expanded so that it covers the entire shipyard, and the title of the subpart (originally called "Explosive and Dangerous Atmospheres in Vessels and Vessel Sections") be changed to clarify that this standard addresses all confined spaces in shipyards. In addition, SESAC recommended that several provisions be added to subpart B in order to make it a comprehensive standard for shipyard confined spaces. First, a paragraph covering training requirements and duties of confined space entrants (similar to that proposed for general industry in § 1910.146(e), 54 FR 24104, June 5, 1989); second, a new paragraph on self-rescue and rescue teams (similar to that proposed for general industry in § 1910.146 (e)(4) and (h), respectively); and, third, a new paragraph addressing the duty of employers to on site contractors (similar to that proposed for general industry in § 1910.146(c)(10), 54 FR 24103, June 5, 1989) were suggested.

As recommended by SESAC, the additional provisions would constitute a comprehensive subpart that would be applicable to confined space hazards encountered in shipyard employment. As expanded, the proposed subpart B standards would extend to all shipyard confined space operations—those on land as well as on vessels and vessel sections, whereas the November 1988

subpart B proposal limited its scope to safe entry into confined spaces on vessels and vessel sections. OSHA solicits public comments on SESAC's recommendations and suggested changes to Subpart B which are set out in detail in the Issues section of the notice below.

## II. Issues

OSHA is soliciting public comment on a number of issues involving subpart B. Some of these issues are directly related to SESAC's recommendations while others have been brought to the Agency's attention by various parties since the subpart B NPRM was published. In responding to these issues, commenters are asked to provide rationale in support of their responses and to identify the relevant issue or text by issue number, question designation (such as (A), etc.), or proposed section/paragraph, if applicable.

### Issue B-1

In discussions at several SESAC meetings, various members of the Committee noted that fires and explosions can occur almost anywhere in a shipyard, not just in confined spaces, but in enclosed spaces and open spaces as well. This view has been supported by a fatality report that OSHA published in January 1990 ("Selected Occupational Fatalities Related to Ship Building and Repairing as Found in Reports of OSHA Fatality/Catastrophe Investigations," Exhibit 2). The purpose of the analysis is to provide information that would highlight areas of interest for standards review and development, to aid in regulatory assessment, in training and educational programs, in consultation programs, and in targeting compliance efforts. Therefore, so that all employees will be protected from the hazards of working in spaces where explosive and other dangerous atmospheres exist in shipyard work places and operations (including shipbuilding, ship repairing, and ship breaking), OSHA agrees that the standard should cover the entire shipyard rather than having patchwork coverage by having the general industry proposed standard cover land-side operations in the shipyard and a different set of requirements on vessels and vessel sections.

SESAC voted to recommend that the name of this standard (that is, the subpart heading) be changed from "Explosive and Other Dangerous Atmospheres in Vessels and Vessel Sections" to "Confined Spaces and Explosive and Other Dangerous Atmospheres" to reflect more accurately the expanded scope envisioned by the

SESAC committee. The change to the subpart heading would clarify that it covers all shipyard operations, not just vessels and vessel sections. The Committee also recommended making a similar change to the paragraph on scope and application (§ 1915.11(a); Tr. 36, 63-64, 4/25/90).

The paragraph on scope and application (§ 1915.11(a)) in the November 1988 proposal read as follows:

This subpart sets forth requirements to protect employees during work in explosive and other dangerous atmospheres in and on vessels and vessel sections during shipbuilding, ship repairing, and shipbreaking operations.

As modified, paragraph (a) of § 1915.11, entitled "Scope and application," would read as follows:

This subpart sets forth requirements to protect employees from the hazards of entering and working in spaces where explosive and other dangerous atmospheres exist in shipyard employment activities and operations (including shipbuilding, ship repairing, and ship breaking).

OSHA requests comments and rationale as to whether the proposed subpart B with the changes discussed herein can adequately protect shipyard workers from the hazards encountered in confined spaces.

(A) If commenters believe that the new heading and scope are not inclusive enough to cover the entire shipyard, what alternatives are suggested?

(B) Are there activities that are sufficiently different or unique to shipboard versus landside operations that would make this expanded scope impracticable?

(C) Should OSHA include a requirement for shipyard employers to evaluate their workplaces to determine if they contain any confined spaces and to reevaluate a work area if the condition or use of that space has changed, as required in proposed § 1910.146(c) of the general industry confined space (permit space) standard?

(D) Should employers be required to take measures, such as those in proposed § 1910.146 (c)(5) and (g)(2), to prevent unauthorized entry into work areas that have been identified as confined spaces?

(E) Would a permit system similar to the system prescribed in the proposed general industry confined space standard for landside operations (§ 1910.146(b)(10), which appeared at 54 FR 24102, June 5, 1989) also be feasible for confined spaces in vessels and vessel sections?



(F) Should the concept of posting an "attendant" at every "permit-required" confined space as proposed in § 1910.146(b)(2) be considered in the expanded subpart B? If not, why not?

(G) If OSHA were not to require the posting of attendants for confined space entry operations, how should subpart B ensure that employees are able to summon rescue when needed?

(H) Should the § 1915.16 warning signs requirements be applicable to land-side operations? The provisions of this section require that after a space or compartment has been certified, "Safe For Men—Not Safe For Fire," or "Not Safe For Men—Not Safe For Fire," shall be plainly and conspicuously marked with paint or signs indicating that no hot work or entrance into these spaces shall occur.

(I) The concepts of "competent person," "marine chemist," "certified industrial hygienist," and "Coast Guard-authorized person" are defined in proposed § 1915.7 (at 54 FR 24102, June 5, 1989), and are used in the text of a number of provisions in proposed subpart B, including §§ 1915.12(c)(2) and 1915.14(a), among others. Comments are sought as to whether these terms and related requirements are appropriate for both land-side and shipboard operations, or whether there are enough different or unique situations and processes in shipboard activities (versus landside operations) to require the use of different terms for shipboard and landside operations, respectively. Would it be more appropriate to list the duties associated with the two distinct categories of "competent person" and "qualified person"? If you do not believe that a single set of terms is appropriate, please describe the differences between shipboard and land-side operations that would make a single designation impractical.

(J) Would subpart B, as expanded, adequately address non atmospheric hazards (e.g., general safety hazards such as slip, trip, and fall hazards and machine guarding) that may be encountered in confined space or permit space work?

(K) Are there any provisions from the proposed general industry confined space standard other than those addressed in this document that should be incorporated into the expanded Subpart B to protect workers in confined spaces in shipyards?

#### Issue B-2

In a study conducted by OSHA, entitled "Selected Occupational Fatalities Related to Shipbuilding and Repairing as Found in Reports of OSHA Fatality/Catastrophe Investigations,"

(Exhibit 2) it was found that one of the factors contributing to accidents in shipbuilding and ship repairing was the lack of adequate training, especially with respect to new jobs. The report suggests, among other things, that improved efforts in training and education will help prevent accidents in the workplace. In the confined spaces context, SESAC believes that familiarizing authorized entrants with the potential hazards in the confined spaces to be entered will significantly increase the likelihood that an entrant will detect a hazard in time for successful escape or rescue. In addition, SESAC considers implementation of an effective training program to be one of the most important steps an employer can take to ensure a safe workplace.

(A) Should shipyard confined space workers receive special training to enable them to understand restrictions for confined-space entry and working in and around adjacent spaces?

(B) Should such special training include training in the use of flammable atmosphere detectors and oxygen meters?

(C) Another change recommended by SESAC was to add the following new paragraph (e) to § 1915.12 (Tr. 36-37, 66-80, 4/25/90) to address hazard recognition and personal protective equipment. (The text is similar to OSHA's proposed § 1910.146(e) which appeared at 54 FR 24104, June 5, 1989.) Proposed paragraph (e) would read as follows:

(e) *Training and duties of confined-space entrants.* The employer shall ensure that employees who work as confined-space entrants receive appropriate training and perform their assigned duties in accordance with the employer's program, as follows:

(1) *Hazard recognition.* The employer shall ensure that confined-space entrants are trained to:

- (i) Recognize the characteristics of a confined space;
- (ii) Be aware of the hazards that may be faced during entry;
- (iii) Recognize the signs and symptoms of exposure to the hazard; and
- (iv) Understand the consequences of exposure to the hazard.

(2) *Protective equipment.* The employer shall ensure that confined-space entrants are trained to:

- (i) Be aware of the personal protective equipment needed for safe entry and exit;
- (ii) Use the personal protective equipment properly; and
- (iii) Where necessary, be aware of the external barriers needed to protect entrants from external hazards and of the proper use of those barriers.

Public comment is solicited as to whether such provisions should be added to subpart B as SESAC recommended.

#### Issue B-3

The proposed general industry standard on confined spaces relies on attendants for rescue from confined-space (permit-space) situations. OSHA's proposed shipyard standard on confined spaces in vessels and vessel sections does not. The Agency notes that the narrowly configured openings of many confined spaces found in shipyards and on vessels and vessel sections can make it very difficult for rescuers to pull or to carry out victims of confined-space hazards. SESAC believes that self-rescue often will provide the entrant's best chance of escaping a space when a hazard is present. The time lost waiting for the attendant to summon rescuers, waiting for the rescue team to arrive, or waiting for the attendant to perform any other rescue duties can be the difference between life and death. Therefore, SESAC believes that in shipyards, it is more important to stress self-rescue as a means of saving lives and minimizing injuries of shipyard employees working in confined spaces.

Subpart B takes a different approach to confined-space hazards than the proposed § 1910.146. The basic premise behind the current part 1915, subpart B, is to test and ventilate before entry into confined spaces as well as during work operations. This provides the entrants with first-hand knowledge of the potential hazards that may exist. Therefore, subpart B does not require attendants. However OSHA solicits comments on the extent to which an attendant would be useful in performing non entry rescue operations.

SESAC also recommended the addition of the following new paragraph to § 1915.12 (Tr. 37, 66-80, 4/25/90). The text is similar to OSHA's proposed § 1910.146(e)(4) for general industry, which appeared at 54 FR 24104, June 5, 1989. The paragraph would be included in paragraph (e), Training and duties of confined space entrants, and would be designated as proposed § 1915.12(e)(3). The paragraph would read as follows:

(e)(3) *Self-rescue.* The employer shall ensure that confined space entrants are trained to exit the space when:

- (1) The employer or his representative orders evacuation;
- (2) An alarm is activated signaling evacuation; or
- (3) The entrants perceive that they are in danger.

Public comment is solicited on the above issue and SESAC recommendations.

#### Issue B-4

Employers may need to rely on outside rescuers in some situations.



OSHA believes it is very important that employers keep designated rescuers informed of potential rescue needs.

(A) Should OSHA specify rescue team size, equipment, or maximum time for response to a rescue scene?

(B) Should the rule require any protocols (e.g., preplanning with local rescue services) for use of an outside rescue team on the employer's premises?

(C) SESAC recommended the addition of the following new paragraph to §1915.12 (Tr. 37-38, 80-90, 4/25/90). The text is similar to OSHA's general industry proposed §1910.146(h), which appeared at 54 FR 24105, June 5, 1989. The paragraph would be designated as proposed §1915.12(f) and would read as follows:

(f) *Rescue team.* The employer shall have either an in-plant rescue team, or an arrangement under which an outside rescue team will promptly respond to a request for rescue services.

(1) *In-plant rescue team.* If the employer decides to use an in-plant team, the employer shall ensure that:

(i) Personnel assigned to an in-plant rescue team are provided with and trained to properly use the personal protective equipment, including respirators, and rescue equipment necessary for making rescues from the confined space;

(ii) The in-plant rescue team is trained to perform the assigned rescue functions and has received the training required for confined-space entry;

(iii) Rescue teams practice making rescues at least once every 12 months, by means of simulated rescue operations in which they remove dummies, mannequins or personnel through representative doors, hatches, manholes, openings, and portals whose size, configuration, and accessibility closely approximate those of the confined spaces from which rescues may be required (actual rescues satisfy these practices rescue requirements); and

(iv) At least one member of each rescue team maintains current certification in basic first aid and cardiopulmonary resuscitation (CPR) skills (First Responder Qualified).

(2) *Outside rescue team.* If the employer chooses to use outside rescue services, the employer shall ensure that the designated rescuers are informed of the hazards which they may encounter when called on to perform rescues at the employer's facility, so that the outside rescue teams are properly equipped and trained.

Public comment is solicited on the above issue and SESAC's recommendations.

#### Issue B-5

(A) When the employer hires contractors to perform work in or near confined spaces, should OSHA require that the employer provide the contractor with complete information on all known hazards in a confined space, such as

known fire or explosion hazards related to the contractor's work?

(B) Should OSHA require an employer to explain its emergency action plan to the contractors.

(C) OSHA believes that contractors need information on confined space hazards and emergency action plans in order to comply with this standard and to assure that contractor actions do not put contractor employees or other employees working on that site at risk. Compliance with this standard is important whenever an employer identifies confined spaces which are to be entered by employees, regardless of whose employees that are. A contractor whose employees enter confined spaces would be under the same obligation as any other employer to comply with this standard. Also, OSHA believes that contractors who are unfamiliar with a particular workplace may be seriously hampered in their efforts to identify and control potential hazards. Contractors working on a job site can endanger not only their own employees but other employer's employees as well.

(D) SESAC recommended that a new paragraph on the duty of employers and contractors be incorporated into §1915.12 (Tr. 38-39, 90-99, 4/25/90). The following paragraph which incorporates SESAC's recommendations is similar to OSHA's general industry proposed §1910.146(c)(10), which appeared at 54 FR 24103, June 6, 1989:

(g) *Duty to other employers.* The host employer shall ensure that when any contractor in the shipyard plans to send employees into a confined-space which may be under the control of another employer/contractor (host employer), the host employer provides the contractor with all available information on the confined space hazards and any other workplace hazards, safety rules, and emergency procedures which the contractor needs to comply with this subpart and the contractor informs the employer of any hazards encountered during entry operations.

Public comment is solicited on the above issue.

#### Issue B-6

Hot-work permits are required in other part 1910 standards and the language set out below is consistent with the treatment of hot-work permits in other OSHA standards. Should OSHA require posting of hot work permits in shipyards, and if so, where should they be posted in relation to where the hot work is done? Comments are requested on the suggested text for the following new paragraph (h), similar to OSHA's general industry standard, which would be incorporated into §1915.12.

(h) *Hot-work permit.* (1) The employer shall issue a permit for all hot work, with the following exceptions:

(i) Where the employer or the employer's representative (who would otherwise authorize the permit) is present while the hot work is being performed;

(ii) In welding shops authorized by the employer;

(iii) In hot-work areas authorized by the employer which are located outside the confined space.

(2) The permit shall certify that the requirements contained in §1910.253(b)(4)(iv) regarding the use of a liquid oxygen system to supply gaseous oxygen for welding or cutting, have been implemented prior to beginning the hot-work operations. The permit shall be kept on file until completion of the hot-work operations. The purpose of the permit is to ensure that the employer is aware of the hot work being performed, and that appropriate safety precautions have been taken prior to beginning the work.

#### Issue B-7

When proposed Subpart B was published, OSHA determined that it would impose no additional cost of compliance on the shipbuilding and ship repairing industry because " \* \* \* all of its requirements are consistent with current industry practices and are part of existing consensus or OSHA standards."

OSHA needs to develop a record on the cost implications of (1) extending the proposed subpart B requirements to land-side facilities and (2) adding the selected provisions outlined in this notice from the general industry proposal to subpart B (for land-side applications and vessels that were recommended by SESAC). OSHA solicits information on the impact that these requirements would have on the anticipated cost of a revised subpart B.

Specifically, OSHA requests information on the following questions:

(A) Is it appropriate for OSHA to assume that employers would incur no additional cost if subpart B requirements were extended to land-side facilities of shipyards? If not, what would be the cost to shipyards of adopting the provisions discussed in this document.

(i) What are the costs of developing and implementing a training program that would address the requirements of proposed §1910.146?

(ii) What are the costs or other impacts of establishing an in-house rescue team? Could costs be contained without minimizing the safety of workers if emergency rescue services were contracted to outside sources?

(B) What are the costs of implementing a permit-entry program for shipyards, i.e., posting of a permit at the entrance of every confined space which



includes information such as date, time, atmospheric conditions, and toxicity data as opposed to keeping atmospheric and toxicity data in the immediate vicinity of the operation as required by 29 CFR 1915.7 (which requires employers to use the U.S. Department of Labor Form OSHA 74 "Log of Inspection and Test by Competent Person")?

(C) What are the costs of implementing an attendant program for shipyards (e.g., training and posting an attendant at each confined space throughout the shipyard)?

(D) What are the costs of implementing a hot work permit system for shipyards?

#### Public Record

The public comments submitted in response to the November 1988 proposed rulemaking, along with OSHA's exhibits, and the comments pertaining to shipyards from the § 1910.146 proposal are already a part of the subpart B record and are available for inspection and copying at the U.S. Department of Labor, Docket Office, Docket No. S-050, room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-7694.

#### Public Participation

Interested parties are invited to submit data, views, and comments on this new material. All timely submissions must be in quadruplicate and will be made a part of record of this proceeding, and will be available for public inspection and copying at OSHA's Docket Office.

#### List of Subjects in 29 CFR Part 1915

Environmental protection, Fire prevention, Flammable materials, Hazardous substances, Marine safety, Occupational safety and health, Shipyard employment, Vessels, Welding

**Authority:** This document was prepared under the direction of Dorothy L. Strunk, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

It is issued pursuant to section 41 of the Longshore and Harbor Worker's Compensation Act, as amended (72 Stat. 835; 33 U.S.C. 941), sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR Part 1911 and Secretary of Labor's Order No. 1-90 (55 FR 9033).

Signed at Washington, DC, this 18th day of June 1992.

Dorothy L. Strunk,

Acting Assistant Secretary of Labor.

[FR Doc. 92-14815 Filed 6-23-92; 8:45 am]

BILLING CODE 4510-26-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Ch. I

[FRL-4147-4]

#### Public Meetings on the Hazardous Waste Identification Rule

**AGENCY:** Environmental Protection Agency.

**ACTION:** Public meetings.

**SUMMARY:** EPA's Office of Solid Waste will conduct three Roundtable Discussions on issues raised by its recently proposed Hazardous Waste Identification Rule (57 FR 21450). The proposed rule contained a number of different options for exempting low-toxicity wastes under Subtitle C of RCRA. The first discussion on implementation issues, including waste testing, will be conducted on July 8; the second discussion on exposure and monitoring issues will be conducted on July 14; and the third discussion on contaminated media and corrective action issues will be conducted on July 15.

**DATES:** July 8, 14 and 15, 1992. All meetings will begin at 8:30 a.m. and end at 5 p.m..

**ADDRESSES:** The meetings will be held at the Washington Hilton, 1919 Connecticut Avenue, NW., Washington, DC 20009, (202) 483-3000.

**FOR MORE INFORMATION CONTACT:** For information on substantive matters, please contact William A. Collins, Jr., of the Waste Identification Branch, at (202) 26-4791. For information on administrative matters, or to advise of your intent to attend, please contact Michael Young or Denise Madigan, EPA's Roundtable Co-Conveners at (212) 725-6160, and (202) 429-8782, respectively.

Dated: June 19, 1992.

Chris Kirtz,

Director, Consensus and Dispute Resolution Program.

[FR Doc. 92-14843 Filed 6-23-92; 8:45 am]

BILLING CODE 6580-50-M

### 40 CFR Part 52

[CT8-1-5465; A-1-FRL-4147-3]

#### Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Reasonably Available Control Technology for Sikorsky Aircraft Division in Bridgeport

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Connecticut. This revision establishes and requires the use of reasonably available control technology (RACT) to control volatile organic compound (VOC) emissions from Sikorsky Aircraft Division of the United Technologies Corporation (Sikorsky) in Bridgeport, Connecticut. The intended effect of this action is to approve a source-specific RACT determination made by the State in accordance with commitments made in its ozone attainment plan originally approved by EPA on March 21, 1984 (49 FR 10542). This action is being taken in accordance with section 110 of the Clean Air Act.

**DATES:** Comments must be received on or before July 24, 1992. Public comments on this document are requested and will be considered before taking final action in this SIP revision.

**ADDRESSES:** Comments may be mailed to Linda M. Murphy, Director, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Boston, MA 02203. Copies of the State submittal and EPA's technical support document are available for public inspection during normal business hours, by appointment at the Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, One Congress Street, 10th floor, Boston, MA, and the Bureau of Air Management, Department of Environmental Protection, State Office Building, 165 Capitol Avenue, Hartford, CT 06106.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Judge, (617) 565-3248; FTS 835-3248.

**SUPPLEMENTARY INFORMATION:** On March 21, 1984, EPA approved subsection 22a-174-20(ee) of Connecticut's regulations as part of Connecticut's 1982 Ozone Attainment Plan. This regulation requires the Connecticut Department of Environmental Protection to determine and impose RACT on all stationary sources with potential VOC emissions of one hundred tons per year (TPY) or more that are not already subject to Connecticut's regulations developed pursuant to the Control Techniques Guideline (CTG) documents. The total potential VOC emissions from Sikorsky Bridgeport's otherwise unregulated processes exceed 100 TPY.



## Background

On October 13, 1988, the DEP finalized State Order No. 8015 which defined RACT for Sikorsky Bridgeport. Earlier, the DEP had finalized a similar State Order (State Order No. 8010) imposing RACT on Sikorsky's Stratford facility and submitted it to EPA as a SIP revision. A notice of proposed rulemaking (NPR) proposing to approve the State Order for the Sikorsky Stratford facility was published by EPA for public comment on June 22, 1988 (53 FR 23416). While no formal public comments were submitted on the NPR, that State Order and State Order No. 8015 for the Bridgeport facility were appealed by Sikorsky on November 22, 1988. A formal hearing was held on the appeal on February 14, 1989. A decision by the Connecticut hearing officer on the appeal was issued on September 29, 1989.

On March 27, 1990, the State of Connecticut formally submitted a RACT determination for Sikorsky in Bridgeport as a SIP revision. This RACT determination package addressed the findings of the hearing officer as a result of the appeal. No substantive changes were made to State Order No. 8015 as a result of the appeal. State Order No. 8015 requires Sikorsky to achieve compliance with Connecticut's federally-approved regulation for solvent metal cleaning (i.e., 22a-174-2-(1)) for one degreaser which was previously exempt from this rule. Further, State Order No. 8015 requires Sikorsky to meet and maintain emission limitations in terms of pounds of VOC per gallon of coating (minus water) for one spray booth which coats helicopters and helicopter parts, and requires Sikorsky to maintain the VOC emissions from one other spray booth at 40 pounds of VOC per day or less. The order also required the permanent shutdown of one degreaser and one spray booth.

On November 15, 1990, the Clean Air Act Amendments of 1990 (CAAA) were enacted. Section 182(a)(2)(A) of the CAAA required that all states that were required to make corrections to RACT regulations, needed to revise their VOC regulations to make them consistent with EPA guidance by May 15, 1991. Connecticut began its efforts to revise its VOC regulations well before enactment, and on October 18, 1991, EPA published a final rule approving Connecticut's revised VOC regulations as part of the SIP. The revised Connecticut VOC regulations include changes which affect this Sikorsky RACT determination. In fact, had Connecticut's VOC regulations been consistent with EPA guidance at the

time this Sikorsky "non-CTG" RACT determination was developed, certain operations at this source would have been subject to Connecticut's VOC regulations developed pursuant to CTGs and not subject to subsection 22a-174-20(ee) for non-CTG operations. As a result, Connecticut's revised requirements in subsections 22a-174-20(1), "Metal cleaning" and 22a-174-20(s), "Miscellaneous metal parts and products," now supersede portions of this State Order.

Where the requirements of the Sikorsky RACT determination and of subsections 22a-174-20(1) and 22a-174-20(s) overlap, the more stringent requirements must be met. For example, part II of the Compliance Timetable of the Order exempts the adhesive primer booth from control because it individually emits less than 40 pounds per day, as allowed under an earlier version of subsection 22a-174-20(s). However, subsection 22a-174-20(s) now requires that any facility that has actual facility-wide emissions greater than 15 pounds per day from miscellaneous metal parts coating to be subject to the emission limitations in subdivision 22a-174-20(s)(3). Therefore, since Sikorsky's metal parts coating exceeds this threshold, the adhesive primer booth which coats miscellaneous metal parts is subject to the requirements of subsection 22a-174-20(s). This RACT determination is necessary because not all of the VOC emitting operations at Sikorsky are subject to VOC controls under either 22a-174-20(1) and 22a-174-20(s). This RACT determination defines and establishes RACT for those otherwise unregulated operations.

## Proposed Action

EPA is proposing approval of this source-specific RACT determination for Sikorsky as a revision to the Connecticut SIP. State Order No. 8015 establishes and requires the use of reasonably available control technology (RACT) to control VOC emissions from Sikorsky Aircraft Division of the United Technologies Corporation in Bridgeport, Connecticut.

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the *Federal Register* on January 19, 1989 (54 FR 2214-2225).

EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP Revisions. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any State

implementation plan. Each request for revision to the State implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

The Administrator's decision to approve or disapprove the SIP revision will be based on whether it meets the requirements of section 110(a)(2)(A)-(K) and 110(a)(3) of the Clean Air Act, as amended, and EPA regulations in 40 CFR part 51.

## List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Intergovernmental relations, Ozone, and Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401-7642.

Dated: May 20, 1992.

Julie Belaga,

Regional Administrator, Region I.

[FR Doc. 92-14855 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-M

## 40 CFR Part 180

[OPP-300253; FRL-4062-7]

RIN 2070-AC18

## Propionic Acid; Proposed Exemptions From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** This document proposes that exemptions from the requirement of a tolerance be established for residues of propionic acid in or on meat, milk, poultry, and eggs as a result of application to livestock and poultry drinking water, poultry litter, and storage areas for silage and grain. EPA is issuing this proposed rule on its own initiative. Propionic acid is a normal component of metabolism in the human body. Humans ordinarily consume propionic acid as a natural component of common foods and as an added ingredient. Dietary exposure from pesticidal use of propionic acid would be very low.

**DATES:** Comments, identified by the document control number [OPP-300253], must be received on or before July 24, 1992.

**ADDRESSES:** By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW.,



Washington, DC 20460. In person, bring comments to: Rm. 1128, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 1128 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** By mail: Cynthia Giles-Parker, Product Manager (PM) 22, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 229, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703-305-5540.

**SUPPLEMENTARY INFORMATION:** Upon his own initiative, the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(e)), proposes that an exemption from the requirement of a tolerance under 40 CFR 180.1023 be established for residues of propionic acid in or on meat, milk, poultry, and eggs as a result of application to livestock and poultry drinking water, poultry litter, and storage areas for silage and grain.

When ingested by livestock and poultry, propionic acid is utilized by most organs and tissues and is metabolized to glucose, carbohydrates, amino acids, and lipids. Therefore, residues in meat, milk, or poultry are considered to be negligible.

Propionic acid is a normal component of metabolism in the human body. Humans ordinarily consume propionic acid as a natural component of common foods and as an added ingredient. Dietary exposure from pesticide use of propionic acid would be very low.

Data reviewed by the Agency on technical propionic acid indicate a Toxicity Category III for acute oral, dermal, and inhalation effects and a Toxicity Category I for primary dermal and primary eye irritation.

Subchronic studies using the related compounds calcium and sodium propionate showed some adverse effects in the high-dose test animals, including

lesions of the forestomach and reduced food consumption. When an adult male human was fed 6.0 g/day sodium propionate, the only effect noted was slightly alkaline urine.

In a chronic feeding study using propionic acid, the high-dose rats had hyperplasia and ulcers in the forestomach. However, a similar study using calcium and sodium propionate showed no effects other than initial decreased body weight gain. No maternal or developmental effects have been observed. Propionic acid gave negative results in mutagenicity assays.

Based on the above information considered by the Agency, the exemptions from the requirement of a tolerance for the residues of propionic acid in or on livestock and poultry would protect the public health. Therefore, it is proposed that the exemptions be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [OPP-300253]. All written comments filed in response to this petition will be available in the Public Response and Program Resources Branch, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 [46 FR 24950].

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities,

Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 4, 1992.

Anne E. Lindsay,

Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

#### PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. By revising § 180.1023, to read as follows:

#### § 180.1023 Propionic acid; exemptions from the requirement of a tolerance.

(a) Propionic acid is exempt from the requirement of a tolerance for residues in or on alfalfa, barley grain, Bermuda grass, bluegrass, brome grass, clover, corn grain, cowpea hay, fescue, lespedeza, lupines, oat grain, orchard grass, peanut hay, peavine hay, rye grass, sorghum grain, soybean hay, sudan grass, timothy, vetch, and wheat grain from post-harvest application of propionic acid or a mixture of methylene bispropionate and oxy(bis-methylene) bispropionate when used as a fungicide.

(b) Propionic acid is exempt from the requirement of a tolerance for residues in or on meat, milk, poultry, and eggs when applied as a bactericide/fungicide to livestock and poultry drinking water, poultry litter, and storage areas for silage and grain.

[FR Doc. 92-14848 Filed 6-23-92; 8:45 am]

BILLING CODE 6580-50-F

#### 40 CFR Parts 260, 261, 262, 264, and 268

[FRL-4145-8]

#### Public Meeting on the Hazardous Waste Identification Rule

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of public meeting.

**SUMMARY:** Pursuant to 40 CFR part 25.5, EPA's Office of Solid Waste will conduct a public meeting of the issues raised by its recently proposed Hazardous Waste Identification Rule [57 FR 21450, May 20, 1992]. Commenters who would like to make presentations must provide advanced written notice to Mr. William A. Collins, Jr. at U.S. Environmental Protection Agency, 401 M Street, SW., Mail Code OS-333.



Washington, DC, 20460. Presentations will be limited to five minutes.

**DATES:** On July 9th, the meeting will begin at 9 a.m., and end at 12 p.m.

**ADDRESS:** The meeting will be held at the Washington Hilton, 1919 Connecticut Avenue, NW., Washington, DC, 20009, (202) 483-3000.

**FOR FURTHER INFORMATION CONTACT:**

For information on substantive matters, please contact William A. Collins, Jr., of the Waste Identification Branch, at (202) 260-4791.

Dated: June 11, 1992.

Sylvia K. Lowrance,  
Director, Office of Solid Waste.

[FR Doc. 92-14596 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-M

**40 CFR Part 372**

[OPPTS-400065; FRL-4059-3]

**Ozone Depleting Chemicals; Toxic Chemical Release Reporting; Community Right-to-Know**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is granting a petition to add hydrochlorofluorocarbons (HCFCs) to the list of toxic chemicals subject to reporting under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) by proposing this rule. EPA is proposing that these chemicals be added as a category. A guidance document will also be available which lists all of the HCFCs and isomers which have been identified by the Agency. The addition of these chemicals is based on their contribution to the depletion of stratospheric ozone and the resulting increase in penetration of ultraviolet-B (UV-B) radiation. UV-B radiation is known to cause many adverse human health and environmental effects. EPA believes that these chemicals meet the statutory criteria for listing and should be included on the list.

**DATES:** Written comments on this proposed rule must be received by August 24, 1992.

**ADDRESSES:** Written comments should be submitted in triplicate to: OPPT Docket Clerk, TSCA Public Docket Office TS-793, Environmental Protection Agency, Rm. NE-G004, 401 M St., SW., Washington, DC 20460, Attn: Docket Number OPPTS-400065.

**FOR FURTHER INFORMATION CONTACT:** Maria J. Doa, Petitions Coordinator, Emergency Planning and Community Right-to-Know Information Hotline,

Environmental Protection Agency, Mail Stop OS-120, 401 M St., SW., Washington, DC 20460, Toll free: 800-535-0202, In Washington, DC and Alaska, 703-920-9877.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

*A. Statutory Authority*

This action is issued under section 313(d) and (e)(2) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11023, "EPCRA"). EPCRA is also referred to as Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986.

*B. Background*

Section 313 of EPCRA requires certain facilities manufacturing, processing or otherwise using toxic chemicals to report their environmental releases of such chemicals annually. Beginning with the 1991 reporting year, such facilities also must report pollution prevention and recycling data for such chemicals, pursuant to section 6607 of the Pollution Prevention Act (42 U.S.C. 13106). Section 313 establishes an initial list of toxic chemicals that is comprised of more than 300 chemicals and 20 chemical categories. Any person may petition EPA to add chemicals to or delete chemicals from the list.

EPA issued a statement of petition policy and guidance in the *Federal Register* of February 4, 1987 (52 FR 3479), to provide guidance regarding the recommended content and format for petitions. EPA must respond to petitions within 180 days either by initiating a rulemaking or by publishing an explanation of why the petition is denied.

**II. Description of Petition**

On December 3, 1991, EPA received a petition from the Natural Resources Defense Council, Friends of the Earth, and the Environmental Defense Fund to add hydrochlorofluorocarbons (HCFCs) to the list of toxic chemicals under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986. Specifically, the petitioners are requesting the Agency to add methyl bromide and those HCFCs that are listed as class II ozone-depleting substances in section 602(b) of the Clean Air Act (CAA). In addition, the petitioners requested the Agency under the CAA to add methyl bromide under CAA section 602 and accelerate the phase-out schedule of Class I and Class II substances under CAA section 606(a)(1). The Agency's response to the CAA portion of the petition is proceeding on a separate schedule. This

proposed rule addresses only the EPCRA section 313 portion of the petition. Methyl bromide (bromomethane) is already a listed toxic chemical under EPCRA section 313 and thus will not be addressed further in this proposed rule. The petitioners contend that HCFCs present an imminent and substantial endangerment to public health, welfare, and the environment because they deplete stratospheric ozone. The statutory deadline for EPA's response was May 31, 1992.

**III. EPA's Review of HCFCs**

*A. Introduction*

EPA has already extensively evaluated the risks of ozone depletion and the role of chlorofluorocarbons (CFCs), halons, and HCFCs in that depletion, and published its findings in the following documents: "Analysis of the Environmental Implications of the Future Growth in Demand for Partially Halogenated Chlorinated Compounds" (Ref. 1), "Assessing the Risks of Trace Gases that Can Modify the Stratosphere" (Ref. 2), "Regulatory Impact Analysis: Compliance with Section 604 of the Clean Air Act for the Phaseout of Ozone Depleting Chemicals" (Ref. 3), and "Regulatory Impact Analysis: Protection of Stratospheric Ozone" (Ref. 4). The above references and the document "Scientific Assessment of Ozone Depletion: 1991" (Ref. 5), were used as the basis of EPA's review of this petition. EPA considers the HCFCs to be transitional substances which are critical to the full phase-out of the CFCs. HCFCs have much lower ozone-depletion potentials and are already being developed as first generation substitutes for many CFC uses. Because the HCFCs do add chlorine to the stratosphere, EPA intends to limit their production and use. The HCFCs will serve as a bridge to facilitate the quick elimination of the more harmful CFCs, but will themselves be phased out eventually.

EPA's concerns for these chemicals do not focus on direct toxicity, but rather on the depleting effect these chemicals have on stratospheric ozone and the increase in penetration of ultraviolet-B (UV-B) radiation which is expected to result. HCFCs are known to release chlorine radicals into the stratosphere. Chlorine radicals act as catalysts to reduce the net amount of stratospheric ozone.

Stratospheric ozone shields the earth from UV-B radiation (i.e., 290 to 320 nanometers). Decreases in total column ozone will increase the percentage of



UV-B radiation, especially at its most harmful wavelengths, reaching the earth's surface. Because HCFCs have a shorter atmospheric lifetime, they contribute fewer chlorine radicals to the stratosphere than equal masses of CFCs. However, they still pose a substantial concern for ozone depletion, especially if their use increases dramatically. Exposure to UV-B radiation is known to cause various adverse human health and environmental effects, which are summarized in the following sections.

#### B. Chronic Human Health Effects

Exposure to UV-B radiation has been implicated by laboratory and epidemiologic studies as a cause of two types of nonmelanoma skin cancers: squamous cell cancer and basal cell cancer. Studies predict that for every 1 percent increase in UV-B radiation, nonmelanoma skin cancer cases would increase by about 1 to 3 percent.

Recent epidemiological studies, including large case control studies, suggest that UV-B radiation plays an important role in causing malignant melanoma skin cancer. Recent studies predict that for each 1 percent change in UV-B intensity, the incidence of melanoma could increase from 0.5 to 1 percent.

Studies have demonstrated that UV-B radiation can suppress the immune response system in animals, and, possibly, in humans.

Increases in exposure to UV-B radiation are likely to increase the incidence of cataracts and could adversely affect the retina.

Results from one modeling study and one chamber study suggest that increased UV-B penetration may increase the rate of tropospheric ozone formation. Available data suggest that ozone exposure may lead to chronic health effects, including morphological changes to, and impaired functioning of, the lungs.

#### C. Environmental Effects

Aquatic organisms, particularly phytoplankton, zooplankton, and the larvae of many fishes, appear to be susceptible to harm from increased exposure to UV-B radiation because they spend at least part of their time at or near the surface of waters they inhabit.

Increased UV-B penetration has been shown to result in adverse impacts on plants. Field studies on soybeans suggest that yield reductions could occur in some cultivars of soybeans, while evidence from laboratory studies suggest that two out of three cultivars are sensitive to UV-B.

Laboratory studies with numerous other crop species also show many to be adversely affected by UV-B. Increased UV-B has been shown to alter the balance of competition between plants. While the magnitude of this change cannot be presently estimated, the implications of UV-altered, competitive balance for crops and weeds and for nonagricultural areas such as forests, grasslands, and desert may be far reaching.

#### D. Chemical Comparison with CFCs

The chemistry associated with the depletion of stratospheric ozone involves a very complex set of reactions that are dependent on many factors. However, as with the CFCs, the HCFCs add chlorine radicals to the stratosphere and chlorine radicals play an important role in these ozone depleting reactions. The amount of chlorine radicals added to the stratosphere by an HCFC or a CFC depends on three factors: (1) The amount of chlorine contained in the compound; (2) the rate of destruction of the compound in the troposphere; and (3) the efficiency of photolysis in the stratosphere. Atmospheric lifetimes, which are largely determined by the rate of destruction in the troposphere, represent the period of time that these compounds remain in the atmosphere. Atmospheric lifetimes can range from about 2 years (for HCFC-123) to 550 years (for CFC-115). The atmospheric lifetimes, the three factors listed above, and other factors such as total atmospheric volume are components of the ozone-depletion potential (ODP) of a particular CFC or HCFC.

The atmospheric lifetimes of the HCFCs are determined by their rate of oxidation by hydroxyl radicals (OH) in the troposphere. Photolysis of ozone in the ultraviolet region leads to the formation of the hydroxyl radical which reacts to abstract hydrogen atoms initiating a free radical degradation mechanism. The fully halogenated chlorofluorocarbons (CFCs) do not contain these reactive sites (i.e., hydrogen atoms) and consequently cannot be degraded in this way. They are degraded only by photolysis and since this process does not occur readily in the troposphere little loss of the CFCs occurs.

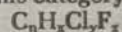
A typical CFC molecule survives anywhere from 55 to 550 years in the atmosphere before it is decomposed by sunlight releasing its constituent chlorine atoms in the stratosphere. Once released, a chlorine atom can affect recombination of between  $10^4$  and  $10^5$  ozone molecules during its lifetime in the stratosphere (on the order of 2 years) before it returns to the troposphere,

mainly as hydrochloric acid. Because of the reactions with the hydroxyl radical in the troposphere, the lifetimes of most of the HCFCs are measured in decades rather than in centuries as are the lifetimes of the CFCs, which do not undergo any significant tropospheric reactions.

HCFCs pose less of a long-term risk than CFCs primarily due to their shorter lifetimes and the subsequent release of the chlorine atoms below the stratosphere.

#### E. Category Definition

The HCFCs, as defined by section 602(b) of the Clean Air Act, are chlorofluoroalkanes that contain one to three carbons and at least one hydrogen. The Clean Air Act list includes the hydrochlorofluorocarbons (HCFC) 21, 22, 31, 121, 122, 123, 124, 131, 132, 133, 141, 142, 151, 221, 222, 223, 224, 225, 226, 231, 232, 233, 234, 235, 241, 242, 243, 244, 251, 252, 253, 261, 262, 271, and their isomers. [Note HCFC 151 was inadvertently excluded from the CAA section 602(b) list. EPA plans to issue a technical correction which will add HCFC 151 to the list at a later date.] When all possible isomers are accounted for, there are several hundred chemicals that would be included in the HCFC category. An initial list of the compounds that have been determined to be in this category, with their names, and Chemical Abstracts Service (CAS) numbers (if assigned), are available in a guidance document published elsewhere in this issue of the Federal Register. However, EPA is proposing that the following formula and results be used to determine if a compound is included in this category:



Where:

n equals 1 to 3;

x, y, z do not equal zero;

and  $x + y + z = 2n + 2$

This mathematical expression produces the following results:

Number of carbons (n)	Sum of x + y + z
1	4
2	6
3	8

The above formula and its definition always include at least one chlorine (Cl) and one fluorine (F) with the remaining substituents being hydrogens. Therefore, this formula will only include compounds that are HCFCs. Any compound that fits this formula is included in this proposed listing even if it is not listed in the guidance document.



#### F. Threshold Determination

EPCRA section 313 requires threshold determinations for chemical categories to be based on the total of all chemicals in the category manufactured, processed, or otherwise used. For example, a facility that manufactures three members of a chemical category would count the total amount of all three chemicals manufactured towards the manufacturing threshold for that category. When filing reports for chemical categories the releases are determined in the same manner as the thresholds. One report is filed for the category and all releases are reported on this form.

#### IV. Rationale for Listing

EPA's concerns for these chemicals do not focus on direct toxicity, but rather on the depleting effect these chemicals have on stratospheric ozone and the increase in penetration of UV-B radiation which will result. EPA believes that releases of these chemicals will lead to stratospheric ozone depletion resulting in increased penetration of UV-B radiation. Because this increased UV-B radiation can be reasonably anticipated to lead to cancer and other chronic human health effects and significant adverse environmental effects, EPA believes that these chemicals meet the statutory criteria for listing found in section 313(d)(2)(B) and (C) of EPCRA.

#### V. Rulemaking Record

The record supporting this proposed rule is contained in docket number OPPTS-400065. All documents, including an index of the docket, are available in the TSCA Public Docket office from 8 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, excluding legal holidays. The TSCA Public Docket Office is located at EPA Headquarters, Rm. NE-G004, 401 M St., SW., Washington, DC 20460.

#### VI. Request for Public Comment

EPA requests public comment on this proposal to add HCFCs to the list of chemicals subject to EPCRA section 313. In addition, the Agency would like to receive comment on alternative methods for adding the HCFCs instead of by category. One alternative would be to add individually the two commercially produced HCFCs (HCFC-22 and HCFC-142b) and also the three HCFCs that are believed to be commercially viable (HCFC-141b, HCFC-123, and HCFC-124). This short list addition would be followed by a Significant New Use Rule (SNUR) pursuant to section 5(a)(2) of the Toxic Substances Control Act (15 U.S.C.

2604) requiring notification of production of any of the unlisted HCFCs. If reported, EPA would initiate rulemaking to add these HCFCs to EPCRA section 313.

By listing HCFCs as a category persons would be required to file one report for their total HCFC releases. They would not report on individual HCFCs. In the alternative method given above, individual Form R reports would be required for each listed chemical which exceeds an activity threshold. Comments should be submitted to the address listed under the ADDRESSES unit. All comments should be submitted on or before August 24, 1992.

#### VII. References

- (1) Analysis of the Environmental Implications of the Future Growth in Demand for Partially Halogenated Chlorinated Compounds. USEPA. (1990).
- (2) Assessing the Risks of Trace Gases that Can Modify the Stratosphere. USEPA. (1987).
- (3) Regulatory Impact Analysis: Compliance with Section 604 of the Clean Air Act for the Phaseout of Ozone Depleting Chemicals. USEPA. (1992).
- (4) Regulatory Impact Analysis: Protection of Stratospheric Ozone. USEPA. (1988).
- (5) Scientific Assessment of Ozone Depletion: 1991. World Meteorological Organization, United Nations Environment Programme, National Aeronautics and Space Administration, National Oceanic and Atmospheric Administration, and U. K. Department of Environment. (1991).

#### VIII. Regulatory Assessment Requirements

##### A. Executive Order 12291

Executive Order (E.O.) 12291 requires each federal agency to classify as "major" any rule likely to result in:

- (1) An annual effect on the economy of \$100 million or more; or
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (3) Significant adverse effects on competition, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

EPA's economic analysis estimates up to 882 additional reports which may entail annual costs to EPA, industry, and States of up to \$1.6 million as a result of the proposed addition of the HCFC category to the section 313 list of toxic chemicals. EPA anticipates that this proposed addition will not have a significant effect on competition, costs, or prices. Therefore, EPA has determined that this proposed rule is not "major."

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires each Federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a "significant impact on a substantial number of small entities."

40 CFR part 372 exempts certain small businesses from reporting; specifically, those facilities with fewer than 10 full-time employees. This exclusion exempts about one-half of all manufacturing facilities in Standard Industrial Classification (SIC) codes 20 through 39 from section 313 reporting. Additionally, facilities which manufacture or process less than 25,000 pounds or otherwise use less than 10,000 pounds of these chemicals annually are not required to report for these chemicals. Thus, many small facilities will not incur any regulatory costs in association with this proposed rule. While not all small establishments will be exempt, EPA's economic analysis indicates that potential compliance costs should not be of sufficient magnitude to place smaller facilities required to report at a competitive disadvantage. Therefore, EPA concludes that this proposed rule is not likely to significantly impact small entities.

#### C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and has assigned OMB control number 2070-0093.

The public reporting burden for this collection of information is estimated to average 43 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA."

#### List of Subjects in 40 CFR Part 372

Community right-to-know, Environmental protection, Reporting and recordkeeping requirements, Toxic chemicals.



Dated: June 3, 1992.

Victor J. Kimm,

Acting Assistant Administrator for  
Prevention, Pesticides and Toxic Substances.

Therefore it is proposed that 40 CFR  
part 372 be amended to read as follows:

#### PART 372—[AMENDED]

1. The authority citation for part 372  
would continue to read as follows:

Authority: 42 U.S.C. 11013 and 11028.

2. In § 372.65(c), by alphabetically  
adding the category,  
hydrochlorofluorocarbons to read as  
follows:

#### § 372.65 Chemicals and chemical categories to which the part applies.

\* \* \* \* \*

(c) \* \* \*

Category Name	Effective Date
Hydrochlorofluorocarbons $C_nH_xCl_yF_z$ Where: $n = 1-3$ ; $x, y, z$ , do not equal 0; and $x+y+z = 2n+2$	1/1/94

[FR Doc. 92-14099 Filed 6-23-92; 8:45 am]  
BILLING CODE 6560-50-F

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[MM Docket No. 92-126, RM-7993]

#### Radio Broadcasting Services; White Stone, VA

**AGENCY:** Federal Communications  
Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests  
comments on a petition by Windmill  
Communications seeking the  
substitution of Channel 285A for  
Channel 261A at White Stone, Virginia,  
and the modification of Station WNDJ-  
FM's construction permit to specify  
operation on Channel 285A. Channel  
285A can be allotted to White Stone in  
compliance with the Commission's  
minimum distance separation  
requirements with a site restriction of  
6.7 kilometers (4.2 miles) northwest to  
accommodate Windmill's desired  
transmitter site. The coordinates for  
Channel 285A at White Stone are North  
Latitude 37-42-00 and West Longitude  
76-26-00.

**DATES:** Comments must be filed on or  
before August 10, 1992, and reply  
comments on or before August 25, 1992.

**ADDRESSES:** Federal Communications  
Commission, Washington, DC 20554. In  
addition to filing comments with the  
FCC, interested parties should serve the  
petitioner, or its counsel or consultant,  
as follows: Richard F. Swift, Esq.,  
Tierney & Swift, 1200 Eighteenth Street  
NW., Suite 210, Washington, DC 20036  
(Counsel for petitioner).

**FOR FURTHER INFORMATION CONTACT:**  
Pamela Blumenthal, Mass Media  
Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a  
synopsis of the Commission's Notice of  
Proposed Rule Making, MM Docket No.  
92-126, adopted June 4, 1992, and  
released June 19, 1992. The full text of  
this Commission decision is available  
for inspection and copying during  
normal business hours in the FCC  
Dockets Branch (Room 230), 1919 M  
Street NW; Washington, DC. The  
complete text of this decision may also  
be purchased from the Commission's  
copy contractor, Downtown Copy  
Center, (202) 452-1422, 1714 21st Street  
NW., Washington, DC 20036.

Provisions of the Regulatory  
Flexibility Act of 1980 do not apply to  
this proceeding.

Members of the public should note  
that from the time a Notice of Proposed  
Rule Making is issued until the matter is  
no longer subject to Commission  
consideration or court review, all *ex  
parte* contacts are prohibited in  
Commission proceedings, such as this  
one, which involve channel allotments.  
See 47 CFR 1.1204(b) for rules governing  
permissible *ex parte* contacts.

For information regarding proper filing  
procedures for comments, see 47 CFR  
1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Beverly McKittrick,

Assistant Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 92-14863 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

##### 47 CFR Part 73

[MM Docket No. 92-130, RM-8007]

#### Radio Broadcasting Services; Canyon City, OR

**AGENCY:** Federal Communications  
Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests  
comments on a petition filed by Blue  
Mountain Broadcasting seeking the  
allotment of Channel 233A to Canyon  
City, Oregon, as the community's first  
local FM service. Channel 233A can be  
allotted to Canyon City in compliance  
with the Commission's minimum  
distance separation requirements  
without the imposition of a site  
restriction, at coordinates North  
Latitude 44-23-18 and West Longitude  
118-56-54.

**DATES:** Comments must be filed on or  
before August 10, 1992, and reply  
comments on or before August 25, 1992.

**ADDRESSES:** Federal Communications  
Commission, Washington, DC 20554. In  
addition to filing comments with the  
FCC, interested parties should serve the  
petitioner, or its counsel or consultant,  
as follows: J. Dominic Monahan, Esq.,  
Dow, Lohnes & Albertson, 1255-23rd  
Street NW., suite 500, Washington, DC  
20037 (Counsel to petitioner).

**FOR FURTHER INFORMATION CONTACT:**  
Leslie K. Shapiro, Mass Media Bureau,  
(202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a  
synopsis of the Commission's Notice of  
Proposed Rule Making, MM Docket No.  
92-130, adopted June 10, 1992, and  
released June 19, 1992. The full text of  
this Commission decision is available  
for inspection and copying during  
normal business hours in the FCC  
Dockets Branch (Room 230), 1919 M  
Street NW., Washington, DC. The  
complete text of this decision may also  
be purchased from the Commission's  
copy contractor, Downtown Copy  
Center, (202) 452-1422, 1714 21st Street,  
NW., Washington, DC 20036.

Provisions of the Regulatory  
Flexibility Act of 1980 do not apply to  
this proceeding.

Members of the public should note  
that from the time a Notice of Proposed  
Rule Making is issued until the matter is  
no longer subject to Commission  
consideration or court review, all *ex  
parte* contacts are prohibited in  
Commission proceedings, such as this  
one, which involve channel allotments.  
See 47 CFR 1.1204(b) for rules governing  
permissible *ex parte* contacts.

For information regarding proper filing  
procedures for comments, see 47 CFR  
1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.



Federal Communications Commission.  
 Beverly McKittrick,  
 Assistant Chief, Policy and Rules Division,  
 Mass Media Bureau.  
 [FR Doc. 92-14804 Filed 6-23-92; 8:45 am]  
 BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 92-131, RM-8005]

#### Radio Broadcasting Services; Copenhagen, NY

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition filed by Tia A. Soliday seeking the substitution of Channel 294C3 for Channel 294A at Copenhagen, New York, and the modification of Station WWLF-FM's construction permit to specify the higher class channel. Channel 294C3 can be allotted to Copenhagen in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7 miles) northeast to avoid a short-spacing to Station WPCX, Channel 295B, Auburn, New York, at coordinates North Latitude 43-56-30 and West Longitude 75-33-00. Canadian concurrence has been requested since Copenhagen is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

**DATES:** Comments must be filed on or before August 10, 1992, and reply comments on or before August 25, 1992.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Tia A. Soliday, 6481 Newport Road, Warners, New York 13164 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92-131, adopted June 10, 1992, and released June 19, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Docket Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 475-1422, 1714 21st Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is not longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.  
 Beverly McKittrick,  
 Assistant Chief, Policy and Rules Division,  
 Mass Media Bureau.  
 [FR Doc. 92-14865 Filed 6-23-92; 8:45 am]  
 BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 92-129, RM-8006]

#### Radio Broadcasting Services; Grundy Center, IA

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition filed by Grundy Broadcasting Company seeking the substitution of Channel 249C3 for Channel 249A at Grundy Center, Iowa, and the modification of Station KGCI-FM's license to specify operation on the higher class channel. Channel 249C3 can be allotted to Grundy Center with a site restriction of 18.2 kilometers (11.3 miles) east to avoid a short-spacing to Station KHBT, Channel 249A, Humboldt, Iowa, and to accommodate petitioner's desired transmitter site, at coordinates North Latitude 42-21-25 and West Longitude 92-33-14. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Grundy Center or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

**DATES:** Comments must be filed on or before August 10, 1992, and reply comments on or before August 25, 1992.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant,

as follows: Cary S. Tepper, Esq., Puttrese, Hunsaker & Ruddy, 6800 Fleetwood Road, suite 100, P.O. Box 539, McLean, Virginia 22101 (Counsel to petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92-129, adopted June 10, 1992, and released June 19, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.  
 Beverly McKittrick,  
 Assistant Chief, Policy and Rules Division,  
 Mass Media Bureau.  
 [FR Doc. 92-14866 Filed 6-23-92; 8:45 am]  
 BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 91-221; FCC 92-209]

#### Television Broadcast Services; Video Marketplace

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This Notice of Proposed Rule Making proposes alternative means of lessening the regulatory burden on television broadcasters as they seek to adapt to the multichannel video marketplace. Last year the Commission released a Notice of Inquiry, 56 FR 40847



(August 16, 1991), which sought comment on whether existing television ownership rules and related policies should be revised in order to allow television licensees greater flexibility to respond to enhanced competition in the distribution of video programming. This inquiry was prompted by the FCC Office of Plans and Policy Working Paper No. 26 (June 1991) (OPP report), which found that the policies of the Commission and the entire federal government has spawned new competition to broadcast services that resulted in a plethora of new services and choices for video consumers. As a result of the comments received in response to the Notice of Inquiry, the Commission adopts this Notice of Proposed Rule Making to consider changes to several of the structural rules that have governed the television industry for many years.

**DATES:** Comments are due on or before August 24, 1992, and replay comments are due on or before September 23, 1992.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Beverly McKittrick, Policy and Rules Division, Mass Media Bureau, (202) 632-5414.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, in MM Docket No. 91-221 adopted May 14, 1992, and released June 12, 1992. The complete text of this Notice of Proposed Rule Making is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1114 21st Street, NW., Washington, DC 20036.

#### Synopsis of Notice of Proposed Rule Making

1. The Commission issues this Notice of Proposed Rule Making ("Notice") in response to comments to its Notice of Inquiry, 56 FR 40847 (August 16, 1991), which was initiated by the Commission's Office of Plans and Policy Working Paper #26, Broadcast Television in a Multichannel Marketplace (June 1991) (OPP report). In the Notice of Inquiry, the Commission sought comment on the report and also asked about rules and policies that could be revised in order to allow television licensees greater flexibility to respond to enhanced competition in the distribution of video programming. The report documented enormous changes in the market for video programming over the period between 1975 and 1990 and

found that the policies of the Commission and the entire federal government (e.g., the 1984 Cable Act) had spawned new competition to broadcast services that resulted in a plethora of new services and choices for video consumers. The report further suggested that these competitive forces were affecting the ability of over-the-air television to contribute to a diverse and competitive video programming marketplace.

2. After reviewing the comments filed in response to the Notice of Inquiry, the Commission is opening this proceeding to consider changes to several of the structural rules that have governed the television industry for many years. These include rules that establish national and local limits for the number of television stations in which one entity may hold an attributable interest, as well as certain rules governing the three national networks. The Commission will also reexamine the radio-television cross-ownership rule, which generally prohibits one entity from owning both a radio and a television station that serve substantially the same area. Through its review of the comments filed in response to the proposals the Commission presents in this Notice of Proposed Rule Making, the Commission expects to identify specific rule changes designed to assure that Commission policy will facilitate the further development of competition in the video marketplace and the attendant advantages to consumers in increased choice.

3. The comments received in response to the Notice of Inquiry generally concur that the television industry has undergone significant changes in the past decade and a half, as reflected in the current state of the video programming market. In particular, the industry has experienced an enormous expansion in the number of video outlets available to most viewers and in the alternative sources of video programming. Since 1975 the number of broadcast television stations has increased by 50 percent, with independent television stations accounting for three-quarters of that growth. Today, more than half of all households receive ten or more over-the-air television signals. At the same time, cable television has grown explosively as a competing force. By 1990, approximately 90 percent of television households were passed by cable; of all television households approximately 60 percent subscribed to cable. With cable channels included, more than half of all households now receive at least 30 channels. In addition, new program networks have emerged. Other

multichannel video providers such as home satellite dish systems and home videocassette recorders also provide alternative sources of video programming.

4. As more program choices and a wider variety of programming have emerged, viewers have begun to mitigate from traditional broadcast services to other program sources. The percentage of total viewing captured by broadcast television stations fell from 81 percent in the 1984-1985 television season to 70 percent during the 1989-1990 season. This decline in broadcast share results in large part from both increased cable penetration and increased cable viewing in cable households. Declining audience shares have been reflected in declining advertising revenues for broadcast television stations and networks.

5. Just as the record reflects consensus concerning the current state of the market, there appears to be general agreement that the competitive structure of the broadcast television industry has changed for the long term and that over-the-air television will face increasing competitive pressure from multichannel media with dual revenue streams. Regulations adopted before the advent of such competition may reduce the ability of broadcasters to respond competitively and to continue offering services that advance the public interest. These conclusions lead the Commission to reexamine and to propose revisions to certain of the rules governing the television industry's market structure.

6. National Ownership Limitations: Section 73.3555(d) of the Commission's Rules limits the number and audience reach of television stations in which a person may hold an attributable interest to 12 stations and 25 percent of total television households. The rule allows ownership of interests in up to two additional stations reaching an additional 5 percent of total television households if those stations are minority controlled. In view of the many changes in the video marketplace, the Commission seeks comment on whether to relax the national ownership rule to allow capture of increased economies of scale, which could permit the production of new and diverse, including locally-produced, programming. Moreover, the Commission believes that the primary concern underlying the national ownership rule—preventing economic concentration and consequent harm to diversity—may have abated with the proliferation of television stations and alternative sources of video programming. If, by altering the current national ownership restrictions, the



Commission could permit broadcast television stations to compete more effectively without permitting undue economic concentration or loss of programming diversity, the Commission believes it should consider such action.

7. With these considerations in mind, the Commission invites comment on amending the national numerical limit to permit common ownership of 20 or perhaps 24 television stations instead of 12 and altering the national reach restriction to permit a group owner to reach 35 percent instead of 25 percent of the national audience. This moderate approach would allow some growth in the size of group owners and provide the Commission an opportunity to assess over time the benefits and any costs of increased station ownership. The Commission also seeks comment on whether a smaller increase in the limits, e.g. from 12 to 18 stations and 25 to 30 percent reach, would adequately serve its goals. Finally, the Commission seeks comment on whether it should modify only the numerical limit (and retain the 25 percent reach limit) to address the concern that it is the numerical limit that unduly restricts group owners wishing to invest in smaller market stations, because such owners will reach substantially fewer television households when they reach the numerical cap than will group owners investing in larger market stations. The Commission also invites comment on any other proposals commenters believe would be consistent with its stated objectives. In addition, the Commission seeks comment on including a similar minority incentive should it modify the national ownership limitations pursuant to any of the proposals outlined above. In particular, commenters are asked to address how such an incentive should be structured.

8. Contour Overlap ("Duopoly"): Section 73.3555(a)(3) of the Commission's Rules prohibits ownership of cognizable interests in television stations with overlapping Grade B contours. The duopoly rule is the oldest and, as far as diversity is concerned, perhaps the most important of the Commission's ownership restrictions. Yet, it is common ownership of precisely those co-located, same-service facilities now governed by the duopoly rule that may hold the most promise for the greatest economic efficiencies. As the Commission recently stated in its decision to relax the radio ownership rules, Report and Order, MM Docket No. 91-140, 57 FR 18089 (April 29, 1992), allowing ownership of more than one station in a market (or region) would permit beneficial merger of

administrative, newsgathering, and production functions. Offering a wider audience to advertisers and sharing joint and common costs, regional networks composed of stations under common ownership could also compete more effectively. Moreover, relaxing the rule may enable financially troubled stations to remain on the air or improve their service, thus promoting the Commission's goals of diversity and localism. Finally, the Commission notes that the level of competition in local markets has greatly increased since the duopoly rule was adopted in 1964. Nonetheless, given the fundamental importance of the contour overlap limitation in protecting the Commission's interest in diversity, the Commission believes caution is counseled in amending this rule.

9. Accordingly, the Commission seeks comment on whether and how it might modify the contour overlap rule to afford broadcasters greater flexibility, yet avoid undue harm to the Commission's underlying competition and diversity concerns. First, the Commission invites comment on whether it should change the signal contour used to determine whether prohibited overlap occurs from the Grade B to the Grade A. This change would narrow the geographic area in which common ownership of television stations would trigger the Commission's rules to an area that more accurately reflects a station's core market. In addition, the rule revision would permit common ownership of stations in neighboring communities, thus facilitating increased operating efficiencies. The Commission seeks comment on whether, given the substantial increase in video programming services available to the public and the increasing competition faced by broadcast television, the proposed change would promote competition without threatening local diversity.

10. The Commission also seeks comment on whether it should further modify its local ownership rules to permit common ownership of television stations with overlapping contours under certain limited circumstances. For example, the Commission could permit combinations involving only UHF stations, thus allowing the licensees of such stations to capture significant economies of scale with respect to administrative, newsgathering, and production functions. This alternative would limit mergers to the class of stations that are often handicapped by less favorable signal propagation characteristics and higher technical operating costs than VHF stations and

that tend to be less profitable than their VHF competitors. On the other hand, limiting the rule change to UHF stations alone would prevent mergers between strong VHF and weak UHF stations. Permitting such mergers might be effective in preserving or improving the service of UHF stations. Accordingly, the Commission also seeks comment on whether it should permit the combination of any two stations where one of the stations is a UHF facility and where a minimum number of separately owned television stations would remain after the proposed combination. The Commission invites comment on these and other proposals that might encourage innovative business arrangements that increase the competitiveness of stations but do not undermine the Commission's interest in diversity.

11. Time Brokerage Agreements: In the radio ownership proceeding, the Commission adopted new rules designed to limit time brokerage agreements that appear to thwart the purpose of its national and local radio ownership rules. The Commission seeks comment on the extent to which time brokerage or LMAs are a pervasive phenomenon in television, whether they present the same competitive concerns the Commission found in the radio industry and whether the Commission similarly should restrict them in the television station context if the Commission substantially relaxes the television local ownership rules.

12. Radio-Television Cross-Ownership Rule: Section 73.3555(b) of the Commission's Rules prohibits a party from holding cognizable ownership interests in a radio station and a television station located in the same market. Note 7 to this rule states that it is the Commission's policy to look favorably upon requests for waiver of this rule if the combination would occur in one of the top 25 television markets and 30 separately owned, operated, and controlled broadcast licensees would remain after the combination, or if the request involves a "failed" station. Given the growth of cable services and the increase in the number of both radio and television stations, the Commission's local ownership rules alone may be sufficient to ensure competitive and diverse radio and television markets. Accordingly, one approach to modifying the Commission's local ownership rules would be to permit consolidation of radio and television ownership under the respective rules for each service without the additional limitation of a "one-to-a-market" rule. The Commission invites



comment on whether this approach would best serve the Commission's public interest goals. At the same time, given that the Commission has just relaxed the radio ownership rules and is considering in this proceeding proposals to relax the duopoly rule for television, the Commission also seeks comment on a more moderate approach which would permit ownership of one AM, one FM, and one television station in a market. This alternative would allow broadcasters to achieve efficiencies from consolidated operation but also would limit local cross-service ownership. A third, more cautious approach would be to eliminate the one-to-a-market rule only for TV/AM combinations. This option would provide benefits of consolidation to both television stations and the AM service. A fourth approach would be to codify the waiver criteria adopted in 1989 and apply them to any market, not just the top 25, in which 30 "independent voices" would remain. Codifying the waiver criteria in this manner would give broadcasters greater flexibility and save both Commission and applicant resources that are now spent on such waiver requests. Finally, commenters are invited to propose other approaches to modifying this rule, indicating how their proposal would promote a financially healthy and diverse set of competitors in the local media distribution market.

**13. Dual Network Rule:** Under § 73.658(g) of the Commission's rules, a television station cannot affiliate with a network that operates more than one network if the networks operate simultaneously and serve substantially overlapping geographic areas. This rule was adopted in 1941, when the Commission found that operation of two radio networks gave NBC excessive control over its affiliates because their contracts did not specify whether a station was part of the Red or Blue network. The rule was extended to television networks in 1946. In 1977, the Commission repealed the rule for radio after concluding that the tremendous increase in the number of radio stations, the greatly lessened economic importance of networks, and the change in the type of network programming (from half-hour or longer entertainment programming to periodic news and information segments of five minutes) rendered the rule an arbitrary restraint on stations' freedom to schedule network programming.

**14.** As the Commission's review of the changing video environment indicates, one of the principal developments taking place is the growth of multiple channel

service providers, which enjoy certain economics of scale and marketing advantages.

**15.** The Commission notes that, with the advancement of satellite technology and associated video compression, the television networks could become multichannel competitors by introducing a multiple channel network and making more efficient use of their existing network distribution facilities. To the extent the dual network rule forestalls such innovations that would enhance program diversity and competition and increase the efficiency of spectrum usage, the rule may be diserving the public interest, especially since the television networks have the resources to invest in technological development and the ability to supply programming for additional channels. In the context of this multiplicity of network and other program sources, the Commission believes that repeal of the dual network rule might expand the flexibility available to existing broadcast program providers with little risk to diversity. The Commission seeks comment, however, on the possibility that eliminating the rule would prevent entry of new, independent programming sources, which are more likely to lack (or to require more time to arrange for) the funds needed to create a full complement of programming for new distribution channels. The Commission also seeks comment on the possible effect of this proposal on network-affiliated broadcast television stations and whether any safeguards are needed to counteract possible anticompetitive conduct.

**16. Network ownership of stations:** Section 73.658(f) of the Commission's rules provides that a network or an entity controlled by a network cannot own television stations in areas where there are few television stations or the stations are of such unequal desirability that competition would be restrained by allowing such licensing. The Commission found that ownership of stations by networks renders them inaccessible to competing networks, and this "bottling up" of the best facilities discouraged the creation and growth of new networks. In view of the radical changes in the television marketplace, the Commission requests comment on repealing this rule. In this regard, the Commission notes that even stations in the smallest markets are subject to significant competition today, whether from other broadcast stations, cable, satellite dishes, other multichannel competition, or VCRs. The Commission thus seeks comment on the following questions: (1) Is there any basis to

assume that a network could achieve an unfair competitive advantage over the other station owners, including large group owners, that are not subject to this restriction? (2) Would allowing networks into the smallest markets bring better service to the public? (3) Is there a need for this separate rule in addition to the Commission's duopoly and one-to-a-market rules?

**17. Broadcast of the programs of more than one network:** Section 73.658(1) of the Commission's rules provides that in television markets in which two stations have already affiliated with two of the three major networks and in which there are one or more independent stations with reasonably comparable facilities, the network without an affiliate in that market must first offer its programming to the independent station before offering it to the affiliated stations. This rule was adopted in 1971 to prevent network bias against primary affiliations with independent stations (particularly UHF stations) in favor of secondary VHF affiliations. The practical effect of the rule is to force the third network to affiliate with the UHF station, thus providing independent stations enhanced access to programming. Given the great increase in the supply of programming since the rules' adoption in 1971, the Commission questions whether any reason remains for a rule limiting the options of networks as "sellers" of network programming and local television stations as "buyers" of that programming. On the other hand, network programming may be so commercially valuable that providing independent stations access to such programming in the circumstances covered by this rule may be viewed as enhancing to their ability to compete. The Commission thus seeks comment on whether market changes now warrant its repealing the rule.

#### Initial Regulatory Flexibility Analysis

**18. Reason for the action:** This proceeding was initiated to review and update the Commission's national and local television ownership rules, certain television cross-ownership rules, and certain rules governing the television broadcast networks.

**19. Objective of this action:** The actions proposed in this Notice are intended to relax some of the national and local ownership and cross-ownership restrictions on television broadcasters, and certain business restrictions on the broadcast television networks, to enable them to adjust to the changing communications



marketplace, and to better respond to the needs of the public.

20. Legal basis: Authority for the actions proposed in this Notice may be found in sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303.

21. Reporting, recordkeeping, and other compliance requirements inherent in the proposed rule: None.

22. Federal rules which overlap, duplicate, or conflict with the proposed rule: None.

23. Description, potential impact and number of small entities involved: Approximately 2700 existing television broadcasters of all sizes may be affected by the proposals contained in this decision.

24. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives: The proposals contained in this Notice of Proposed Rule Making are meant to simplify and ease the regulatory burden currently placed on commercial television broadcasters.

25. As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, by they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981)).

#### Ex Parte

26. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202, 1.1203 and 1.1206(a).

27. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before August 24, 1992, and reply comments on or before September 23, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file

an original and four copies of comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554.

#### List of Subjects in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-14867 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 92-128, RM-8002]

#### Radio Broadcasting Services; South Hill and Lawrenceville, VA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Old Belt Broadcasting Corporation seeking the exchange of channels between Station WSHV-FM, Channel 288A, South Hill, Virginia, and Station WHFD-FM, Channel 255A, Lawrenceville, Virginia, and the modification of the authorizations of both stations, accordingly. Channel 255A and Channel 288A can be allotted to South Hill and Lawrenceville in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter sites specified in Station WSHV-FM's and WHFD-FM's, respectively. The coordinates for Channel 255A at South Hill, Virginia, are 36-44-39 and 78-09-42. The coordinates for Channel 288A at Lawrenceville, Virginia, are 36-45-10 and 77-51-49.

**DATES:** Comments must be filed on or before August 10, 1992, and reply comments on or before August 25, 1992.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Earl R. Stanley, Esq., Wilkinson, Barker, Knauer & Quinn, 1735 New York Avenue, NW., Washington, DC 20006 (Counsel for petitioner).

**FOR FURTHER INFORMATION CONTACT:** Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92-128, adopted June 10, 1992, and released June 18, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission,

Beverly McKittrick,

Assistant Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 92-14868 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants; Notice of 90-Day Findings on Petitions to List the Corral Beach Sand Dune Weevil and to Delist the San Joaquin Kit Fox

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition findings.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) announces 90-day findings on a petition to add the Corral Beach sand dune weevil to the List of Endangered and Threatened Wildlife and on a petition to delist the San Joaquin kit fox. The Service finds that the petitions have not presented substantial information indicating that



the requested actions may be warranted.

**DATES:** The findings announced in this notice were made on October 23, 1990, for the Corral Beach sand dune weevil, and July 30, 1991, for the San Joaquin kit fox. Comments and materials related to these petition findings may be submitted to the Assistant Regional Director at the address below until further notice.

**ADDRESSES:** Data, information, comments, or questions concerning these two petitions should be submitted to the Assistant Regional Director, Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, Eastside Federal Complex, 911 N.E. 11th Avenue, Portland, Oregon 97232. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Leslie Propp, Staff Biologist, at the above address (503/231-6131).

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published in the *Federal Register*. If the Service finds that a petition presents substantial information indicating that a requested action may be warranted, then the Service initiates a status review on that species.

On June 15, 1989, the Service received a petition dated June 8, 1989, from Ms. Sandra Russell, Malibu, California, to list the Corral Beach sand dune weevil (*Trigonomacrus dorothea corallana*) as threatened. The petition stated that the Corral Beach sand dune weevil is known only from the dune area of Corral Beach, Los Angeles County, California, and is threatened by a proposed housing development and construction of a golf course. The petitioner cited a publication by the late Dr. William D. Pierce, Curator of Insects, Natural History Museum of Los Angeles County, as part of her justification for listing. Dr. Pierce identified the Corral Beach population of sand dune weevils as a distinct subspecies, after examination of only three specimens collected in 1939.

The petition has been reviewed by the Fish and Wildlife Enhancement staff at

the Carlsbad Field Office in Carlsbad, California (formerly the Laguna Niguel Field Office, in Laguna Niguel, California). This finding is based on documentation and contacts with Dr. Elbert Sleeper, entomologist, Biology Department, California State University, Long Beach; Mr. Lee Stark, County of Los Angeles, Regional Planning Department; and the Fish and Wildlife Enhancement staff at the Sacramento, California Field Station.

Dr. Sleeper is re-evaluating the taxonomic status of *Trigonomacrus dorothea* populations in southern California. He believes the taxonomic status *Trigonomacrus dorothea corallana* is highly questionable based upon the obscure characteristics and small sample sizes previously used by Dr. Pierce in delineating this subspecies. No one has sampled sand dune weevils in areas immediately adjacent to Corral Beach, and hence, no data indicating whether or not this population interbreeds with other populations having adjacent and/or overlapping distributions is available. The Corral Beach sand dune weevil may not be a truly distinct subspecies.

Originally, a proposed development of approximately 340 acres in the Corral Beach and Corral Creek Canyon area of Los Angeles County, California, included construction of a golf course and several high density housing tracts. This development posed a potential threat to the Corral Beach population of the sand dune weevil through direct alteration, destruction, and/or contamination of the habitat in which the weevil resides. Currently, plans for the golf course and beach development have been suspended. Negotiations are ongoing between the National Park Service, Santa Ana National Recreation Area; the County of Los Angeles; and a private landowner, for a land exchange that will transfer ownership of approximately 200 acres of the area where the Corral Creek development was to occur to the National Park Service. In addition, only low density residential development would be allowed on the remaining 140 acres, which are located inland above Corral Creek Canyon. These actions should not pose a significant threat to this species.

Because of questionable taxonomic status and lack of threats facing this taxon, the Service finds that the petitioner has not presented substantial information indicating the requested action may be warranted. This decision is based on scientific and commercial information contained in the petition, referenced in the petition, and otherwise available to the Service at this time.

On December 23, 1990, the Service received a petition from Dr. Thomas P.

O'Farrell of Boulder City, Nevada, to delist the endangered San Joaquin kit fox (*Vulpes macrotis mutica*).

The petition, dated December 20, 1990, is based on taxonomic considerations concerning the two arid-land fox species known as the kit fox (*Vulpes macrotis*) and the swift fox (*Vulpes velox*), and their respective subspecies. Essentially, Dr. O'Farrell states that the San Joaquin kit fox should be delisted because it is no longer a valid taxon. To support the petition, he submitted a recent article from the *Journal of Mammalogy* entitled "Evolutionary and taxonomic relationships among North American arid land foxes" (Dragoo *et al.* 1990). Based on morphometric and electrophoretic analyses, these authors conclude that all arid-land foxes in North America should be synonymized under one species, *Vulpes velox*, but that two subspecies should be recognized, *V. v. macrotis* and *V. v. velox*, more or less coinciding with the taxa traditionally known as the kit fox and the swift fox, respectively. Under this arrangement, all formerly recognized subspecies of kit foxes and swift foxes would be synonymized under one or the other of the above subspecies. The taxonomic status of the federally listed San Joaquin kit fox would be reduced from a subspecies to a population of a subspecies.

The taxonomic relationships of the arid-land foxes have been debated for some time (Rohwer and Kilgore 1973, Waithman and Roest 1977, Hall 1981, Stromberg and Boyce 1986). In part, this results from the fact that there is little genetic variability in the Order Carnivora, particularly within the Family Canidae (Seal 1969, Clark *et al.* 1975, Wayne and O'Brien 1987), which has led to difficulties in determining where taxonomic divisions in these groups occur. The study on which this petition is based acknowledges this fact, stating that genetic similarity among populations of kit foxes and swift foxes analyzed is "extremely high" (Dragoo *et al.* 1990). For example, electrophoretic data indicated that *Vulpes velox* and the geographically nearest nominal subspecies of *V. macrotis* are nearly identical. Yet these authors also state that morphometric data from this study "clearly differentiate" between the kit fox and swift fox, and that morphometrically these taxa differ "undramatically but consistently"—a situation that "might be expected of either closely related species or well-differentiated subspecies of one species" (Dragoo *et al.* 1990).

The Service is aware of additional research, now in progress, that utilizes



mitochondrial DNA (mtDNA) analysis to clarify the genetic relationships of North American arid-land foxes. According to researchers conducting this study, mtDNA analysis is more sensitive to small population differences than either morphometric or electrophoretic techniques (Katherine Ralls, Smithsonian Institution, pers. comm.; Robert Wayne, University of California, Los Angeles, pers. comm.). Though not yet published, preliminary results of this study indicate that mtDNA haplotypes of kit foxes and swift foxes are more geographically structured than those of larger canids, suggesting more restricted gene flow in these small foxes. Results of this study also suggest that a hybrid zone exists between kit foxes and swift foxes in eastern New Mexico, as do previous studies (Rohwer and Kilgore 1973), and that some gene flow has occurred between Colorado swift fox populations and Nevada kit fox populations (Ralls, pers. comm.). Because of the incomplete stage of this study, it is not clear at this time what conclusions will be drawn concerning the specific or subspecific status of kit foxes and swift foxes (Wayne, pers. comm.).

The preliminary results of both the electrophoretic and mtDNA analyses tend to confirm that the San Joaquin kit fox is a distinct population of arid-land fox, regardless of how it is taxonomically defined. Dragoo *et al.* (1990) report that *Vulpes macrotis nevadensis* from Nevada and *V. m. mutica* from the San Joaquin Valley are the most divergent genetically of the nominal taxa analyzed. Preliminary results of the mtDNA study show that mtDNA haplotypes for the San Joaquin kit fox are the most derived (the most different from the ancestral type) of all kit fox and swift fox populations studied, suggesting that this fox is a distinct monophyletic group (Ralls, pers. comm.). These results support the general observation that the San Joaquin

kit fox is geographically isolated from other kit fox populations by the Sierra Nevada and Tehachapi mountain ranges. They also support current and continued Federal protection for this kit fox population, because the Act permits listing of "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."

The petition to delist the San Joaquin kit fox has been reviewed by the Fish and Wildlife Enhancement staff in Sacramento, California, and by Regional Office staff in Portland, Oregon. No scientific data concerning kit fox population status or other demographic information of any kind was submitted in support of this petition. It is based only on taxonomic considerations.

Based on the preceding discussion, the Service concludes that the status of kit fox and swift fox taxonomy remains open to interpretation and is the subject of continuing scientific debate. Dragoo *et al.* (1990) presents information that certainly has scientific merit, and the taxonomy proposed therein has been accepted by some authors. However, taxonomic revisions referenced in the petition have not been accepted universally, and the ongoing mtDNA study may shed additional light on this question. The Service further concludes that the San Joaquin kit fox is a distinct population segment that is subject to protection under the Act regardless of the outcome of continuing debate over arid-land fox taxonomy.

In conclusion, the Service finds that the petitioner has not presented substantial information indicating that delisting the San Joaquin kit fox may be warranted. This decision is based on scientific information contained in the petition, referenced in the petition, and otherwise available to the Service at this time.

## References Cited

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## Author

This notice was prepared by Bill Lehman (Sacramento Field Office); Kim Gould (Carlsbad Field Office); and Elizabeth Sharpe (Portland Regional Office).

## List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record-keeping requirements, and Transportation.

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted:

Dated: June 10, 1992.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 92-14857 Filed 6-23-92; 8:45 am]

BILLING CODE 4310-F5-M



# Notices

Federal Register

Vol. 57, No. 122

Wednesday, June 24, 1992

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. 92-040-1]

#### Availability of Environmental Assessment and Finding of No Significant Impact Concerning Mexican Fruit Fly Eradication Project

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has prepared and is making available an environmental assessment and finding of no significant impact for the Mexican fruit fly eradication project in the Los Angeles, CA, area. The environmental assessment provides a basis for our conclusion that the methods employed to eradicate the Mexican fruit fly will not have a significant impact on the quality of the human environment.

**ADDRESSES:** Copies of the environmental assessment and finding of no significant impact are available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC 20250, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. In addition, copies of the environmental assessment and finding of no significant impact may be obtained upon request from:

- (1) Michael B. Stefan, Operations Officer, Domestic and Emergency Operations, Plant Protection and Quarantine, APHIS, USDA, room 640, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8247; or
- (2) Jim Reynolds, Regional Director,

Western Regional Office, 9580 Micron Avenue, Sacramento, CA 95827, (916) 551-3220.

**FOR FURTHER INFORMATION CONTACT:** Michael B. Stefan, Operations Officer, Domestic and Emergency Operations, Plant Protection and Quarantine, APHIS, USDA, room 640, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8247.

#### SUPPLEMENTARY INFORMATION:

##### Background

In accordance with 7 U.S.C. 147a, 148, and 450, the Secretary of Agriculture is authorized to cooperate with the States and certain other organizations and individuals to control and eradicate plant pests.

The Mexican fruit fly, which is present in the Los Angeles, CA, area, is an exotic agricultural pest that attacks fruit such as citrus, mangoes, avocados, peaches, pears, and a wide variety of other fruits and vegetables. The short life cycle of the Mexican fruit fly allows rapid development of serious outbreaks that can cause severe economic losses in commercial citrus-producing areas.

The U.S. Department of Agriculture (USDA), in cooperation with the State of California, has developed a project to eradicate the Mexican fruit fly in the Los Angeles, CA, area.

The Animal and Plant Health Inspection Service (APHIS), USDA, has prepared an environmental assessment to evaluate the effects of this eradication project on the environment. Based on the environmental assessment, APHIS has determined that the eradication project in California will not have a significant impact on the quality of the human environment.

The environmental assessment and finding of no significant impact have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), (2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1509), (3) USDA Regulations Implementing NEPA (7 CFR part 1b), and (4) APHIS Guidelines Implementing NEPA (7 CFR part 1b),

and (4) APHIS Guidelines Implementing NEPA (44 FR 50381-50384, August 28, 1979, and 44 FR 51272-51724, August 31, 1979).

Done in Washington, DC, this 18th day of June 1992.

**Robert Melland,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 92-14817 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-34-M

[Docket No. 92-073-1]

#### List of Approved Ports of Embarkation for the Export of Animals to Mexico

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice provides the public with a list of 10 ports available for the export of animals from the United States into Mexico. These ports are approved by the Government of Mexico for this purpose. We are providing this information as a courtesy to persons interested in exporting animals from the United States into Mexico.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael David, Senior Staff Veterinarian, Import-Export Animals Staff, Veterinary Services, APHIS, USDA, room 761, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-7511.

**SUPPLEMENTARY INFORMATION:** The Animal and Plant Health Inspection Service regulates the exportation of certain animals to ensure that they are free from communicable diseases. The regulations in 9 CFR part 91 (referred to below as the regulations), among other things, list the APHIS-approved ports of embarkation for all horses, cattle, sheep, swine, and goats exported from the United States to any country except Mexico or Canada. The regulations do not require animals exported to Mexico or Canada to be exported through APHIS-approved ports of embarkation. However, the Mexican government has approved ports of embarkation for animals exported from the United States into Mexico.



The Director of Animal Health of the Government of Mexico has notified us that the following ports are approved by the Government of Mexico for the export of animals from the United States into Mexico. As a courtesy, we are giving notice that these 10 ports are available for the exportation of animals from the United States into Mexico:

#### Arizona:

Michelenia Trucking Company, Livestock Export Facility, P.O. Box 580 (Old Tucson Road), Nogales, AZ 85628.  
U.S. Import Corral, c/o Bob Crowds, Avenue E., County 25, 1/4 Street, San Luis, AZ 85349.

California, Brandenburg Feedyard, 903 North Highway 98, Calexico, CA 92231.

New Mexico, Columbus Stockyards, Livestock Export Facility, Columbus, NM 88029.

#### Texas:

Texas Department of Agriculture, Livestock Export Facility, International Airport, Brownsville, TX 78520.

Texas Department of Agriculture, Livestock Export Facility, Box 1046, Del Rio, TX 78840.

Texas Department of Agriculture, Livestock Export Facility, Box 1104, Eagle Pass, TX 78852.

Texas Department of Agriculture, Livestock Export Facility, 10800 Socorro Drive, El Paso, TX 79927.

Texas Department of Agriculture, Livestock Export Facility, Route 1, Box 87-P, Laredo, TX 78044.

New Port of Entry Building, Livestock Export Facility, Presidio, TX 79831.

#### Forest Service

#### Southwestern Region, Arizona, New Mexico, West Texas and Oklahoma; Amendment of National Forest Management Plans in the Southwestern Region to Include Guidelines for Management of Habitat for the Mexican Spotted Owl and Northern Goshawks

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Intent to Prepare an Environmental Impact Statement.

**SUMMARY:** The Southwestern Region of the Forest Service is planning to prepare an environmental impact statement on a proposal to amend forest land and resource management plans to incorporate guidelines for management of habitat for the Mexican spotted owl and northern goshawks. The forest plan amendments will incorporate the latest scientific information and practical experience gained from implementing interim guidelines for both species. Interim guidelines for the northern goshawk and manual direction for the Mexican spotted owl will be replaced by forest plan amendments.

**DATES:** Comments in response to this Notice of Intent concerning the scope of the analysis should be received in writing by July 31, 1992.

**ADDRESSES:** Send written comments to USDA Forest Service, Southwestern Region, 517 Gold SW., Albuquerque, New Mexico 87102, Attn: Director of Land Management Planning.

**RESPONSIBLE OFFICIAL:** The Regional Forester, Southwestern Region, will be the responsible official and will decide on amendments to forest plans to incorporate Mexican spotted owl and northern goshawk management guidelines.

**FOR FURTHER INFORMATION CONTACT:** Director of Land Management Planning (505) 842-3210.

**SUPPLEMENTARY INFORMATION:** The Forest Service is planning to amend forest plans in the Southwestern Region to include guidelines for management and protection of habitat for Mexican spotted owls and northern goshawks.

#### Mexican Spotted Owl Background

The Southwest Region has been concerned about the status of Mexican spotted owl since the early 1980's when several draft forest plans proposed increases in the amount of timber to be harvested from slopes greater than 40 percent. Historically, there was little timber harvested from these steeper areas; thus there was little concern expressed about the continued viability

of this species. In 1983, the Regional Forester added this species to his "Sensitive Species List" as concern for Mexican spotted owl population viability increased.

In January 1988, the Regional Forester formed a Task Force comprised of Forest Service and external parties. The Task Force's purpose was to provide recommendations to the Regional Forester on Mexican spotted owl management, studies and monitoring.

In June 1989, the Regional Forester adopted Interim Directive No. 1, which was based on recommendations made by the Task Force. The Region revised and reissued this direction in Interim Directive No. 2 in June 1990. Interim Directive No. 2 expired in December 1991; however, the Regional Forester directed Forest Supervisors to continue implementation of the interim direction until final guidelines could be prepared.

In 1989, the U.S. Fish and Wildlife Service (USFWS) was formally petitioned to list the Mexican spotted owl as a threatened species. The petition for listing, a Status Review of the Mexican spotted owl prepared by USFWS in 1991, and the USFWS proposed rule for listing the Mexican spotted owl as threatened in late 1991 accelerated the Forest Service's effort to prepare a conservation strategy for Mexican spotted owl. A Notice of Intent to prepare an environmental impact statement on the Mexican spotted owl conservation strategy was issued on April 7, 1992. A draft environmental impact statement should be released in Fall 1992. A final environmental impact statement, associated Record of Decision, and appropriate Mexican spotted owl manual direction will be available to the public by Winter 1992. The manual direction that discusses final Mexican spotted owl direction will guide site specific project design until forest plans can be amended by the environmental impact statement prepared as a result of this Notice of Intent.

#### Northern Goshawk Background

The Southwestern Region has been concerned with ensuring the viability of northern goshawk for the last decade. After reviewing the status of northern goshawk in early 1990, the Regional Forester established a Task Force and a separate Scientific Committee to review northern goshawk habitat management needs. Based on information from these two groups, interim guidelines were issued in April 1991, and revised in October 1991. The revised interim guidelines expired June 6, 1992. The Scientific Committee issued their final

This notice provides information only and does not change the regulations in 9 CFR part 91.

Done in Washington, DC, this 19th day of June 1992.

Lonnie J. King,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 92-14819 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-34-M



management recommendations for northern goshawk habitat management guidelines in November 1991. Another set of interim guidelines was published in June 1992, which will guide site specific project design until forest plans can be amended by the environmental impact statement prepared as a result of this Notice of Intent.

Both the Mexican spotted owl manual directive and northern goshawk interim guidelines will be superseded when this environmental impact statement is completed.

Preliminary issues include effects on habitat and population viability; effects on goals, objectives, goods and services to be produced under forest plans; effects on other forest plan standards and guidelines; effects on jobs, income and rural community economics; effects on forest structure and composition; effects on forest health; effects on outstanding statutory rights; and effects on recreation and visual quality. These issues will be refined and developed in detail as scoping proceeds. Comments on the issues and suggestions for additional issues are welcome in response to this Notice of Intent.

A detailed scoping and public involvement plan has not yet been developed. An interdisciplinary team will be selected to do the environmental analysis, prepare and accomplish scoping and public involvement activities. This interdisciplinary team should be selected and begin work in July 1991. Comments on the nature and timing of scoping and public participation activities would be beneficial to the team in preparation of a scoping plan. Additional public notice will be given of specific planned activities when the scoping and public involvement plan is developed.

Preliminary alternatives may include continuation of present forest plan guidelines (no action alternative); continuation of June 1992 northern goshawk interim guidelines and Mexican spotted owl manual direction; amendment of forest plans to incorporate Mexican spotted owl manual direction and June 1992 interim guidelines; and amend forest plans to incorporate different Mexican spotted owl and northern goshawk guidelines. The interdisciplinary team will be developing the range of alternatives to be considered and comments on the range of alternatives to be considered will be beneficial. Additional opportunities to comment on alternatives will be provided as the process proceeds.

It is anticipated that environmental analysis and preparation of draft and final environmental impact statement

will take about 2 years. The draft environmental impact statement can be expected in the fall or winter of 1993 and a final environmental impact statement can be expected the summer of 1994.

A ninety day comment period pursuant to 36 CFR 219.10(b) will be provided for the public to make comments on the draft environmental impact statement. This comment period will be in addition to scoping and other public participation opportunities that will be provided throughout the process. A record of decision will be prepared and filed with the final environmental impact statement. A ninety day appeal period pursuant to 36 CFR 217.8(a) will be applicable.

The ninety day comment period on the draft environmental impact statement will begin when the Environmental Protection Agency's Notice of Availability appears in the *Federal Register*.

It is very important that those interested in this proposed action participate in review of the draft environmental impact statement. To be the most helpful, comments on the draft environmental impact statement should be as specific as possible and may address the adequacy of the statement or the merits of the alternatives discussed (see Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3).

In addition, Federal court decisions have established that reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewers' position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC* 435 US 519, 553 (1978). Environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the final environmental impact statement. *City of Angoon v. Hodel*, (9th Circuit, 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). The reason for this is to ensure that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final.

Dated: June 15, 1992.

R. Forrest Carpenter,  
Deputy Regional Forester, Southwestern  
Region.

[FR Doc. 92-14686 Filed 6-23-92; 8:45 am]

BILLING CODE 3410-11-M

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Amendment of an Import Limit for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Singapore

June 18, 1992.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs increasing a limit.

**EFFECTIVE DATE:** June 25, 1992.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 535-6736. For information on embargoes and quota re-openings, call (202) 377-3715.

#### SUPPLEMENTARY INFORMATION:

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Government of the United States has agreed to increase the 1992 designated consultation level for Category 200.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see *Federal Register* notice 56 FR 60101, published on November 27, 1991). Also see 56 FR 63501, published on December 4, 1991.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Auggie D. Tantillo,  
Chairman, Committee for the Implementation  
of Textile Agreements.

Committee for the Implementation of Textile  
Agreements

June 18, 1992.

Commissioner of Customs,  
Department of the Treasury, Washington, DC  
20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 27, 1991, by the Chairman, Committee for the Implementation of Textile



Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in Singapore and exported during the twelve-month period which began on January 1, 1992 and extends through December 31, 1992.

Effective on June 25, 1992, you are directed to amend the November 27, 1991 directive to increase the limit for Category 200 to 451,996 kilograms<sup>1</sup>.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 92-14811 Filed 6-23-92; 8:45 am]

BILLING CODE 3510-DR-F

## COMMODITY FUTURES TRADING COMMISSION

### Chicago Board of Trade Proposed Contract

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of availability of the terms and conditions of proposed commodity futures contract.

**SUMMARY:** The Chicago Board of Trade (CBOT or Exchange) has applied for designation as a contract market in CBOT agricultural index futures. The Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the proposal for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

**DATES:** Comments must be received on or before July 24, 1992.

**ADDRESSES:** Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Reference should be made to the CBOT agricultural index futures contract.

**FOR FURTHER INFORMATION CONTACT:** Please contact Frederick Linse of the Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581, telephone 202-254-7303.

<sup>1</sup> The limit has not been adjusted to account for any imports exported after December 31, 1991.

**SUPPLEMENTARY INFORMATION:** Copies of the terms and conditions will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission 2033 K Street NW., Washington, DC 20581. Copies of the terms and condition can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 254-6314.

Other materials submitted by the Exchange in support of the application for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the terms and conditions, or with respect to other materials submitted by the exchange in support of the applications, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581 by the specified date.

Issued in Washington, DC, on June 19, 1992.

Gerald D. Gay,

*Director.*

[FR Doc. 92-14820 Filed 6-23-92; 8:45 am]

BILLING CODE 6351-01-M

## DEPARTMENT OF DEFENSE

### Department of the Army

#### Rules and Accessorial Services Governing the Movement of Department of Defense Bulk Liquid Commodity Traffic Requiring Tank Truck Service

**AGENCY:** Military Traffic Management Command, DOD.

**ACTION:** Procedural changes in DOD freight rate acquisition programs: final rule.

**SUMMARY:** On September 10, 1991, the Military Traffic Management Command (MTMC), published a cancellation to the final notice on Rules and Accessorial Services Governing the Movement of Department of Defense Bulk Liquid Commodity Traffic Requiring Tank Truck Service (56 FR 46769). MTMC Freight Traffic Rules Publication No. 4, will be issued on August 3, 1992, with an

effective date of November 30, 1992. The following items were appended since the cancellation of the previous publication: new DOD Unique Commodity Codes for Bulk Liquids, Astray freight telephone numbers; requirements for the Prompt Payment Act and notations to confirm normal pickup and delivery hours. Copies of the publication and related information may be obtained after the issue date, by writing to: Military Traffic Management Command, ATTN: MTIN-NG, 5611 Columbia Pike, Falls Church, VA 22041-5050.

**EFFECTIVE DATE:** November 30, 1992.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Blaise Guzzardo or Ms. Leesha Saunders, HQ, Military Traffic Management Command, ATTN: MTIN-NG, 5611 Columbia Pike, Falls Church, VA 22041-5050, or telephone (703) 756-1585.

**SUPPLEMENTARY INFORMATION:** The transportation regulatory reform legislation enacted over the past several years has brought an influx of new carriers doing business with DOD resulting in a corresponding proliferation of rate publications, and a great diversity in the manner in which carriers' rates, rules, and services are expressed within those publications. As a result, the standardization and automation of carriers' rates and charges are essential to the formulation of a successful and manageable rate comparison program. Automation is feasible, of course, only if these rates and charges are expressed in a uniform manner compatible with electronic data processing.

MTMC Freight Traffic Rules Publication No. 4 (MFTRP No. 4) contains both rules and accessorial service requirements to govern the rates and services of all motor tank truck carriers doing business with DOD. The publication has application to both interstate and intrastate commerce from, to, or between points in the continental United States (CONUS), and from, to or between points in CONUS and points in Alaska and/or Canada which are specified in carriers' individual tenders filed with HQ, MTMC. The purpose in developing this publication is to define and clearly express the transportation needs of DOD for the movement of bulk liquid commodities requiring tank truck service and to provide the standardization necessary for achieving a fully automated system for routing and auditing DOD traffic.

This publication is designed to be used with DOD Standard Tender of Freight Services, MT Form 264-R. Bulk



liquid commodity tenders filed on or after November 30, 1992, must be submitted on MT Form 364-R. Carriers with voluntary rate tenders currently filed on Optional Form 280, will have to cancel those tenders and re-submit their tenders on MT Form 364-R, by the effective date of the governing publication. Tenders of carriers subject to MFTRP No. 4 may not refer to any other publication for application of rates and charges therein.

The earlier edition of this publication, dated August 30, 1991, was rescinded, as of September 16, 1991 (56 FR 46769) and should be discarded. Only the August 3, 1992 issue of this publication will be used.

**Kenneth L. Denton,**

*Army Federal Register Liaison Officer.*

[FR Doc. 92-14839 Filed 6-23-92; 8:45 am]

BILLING CODE 3710-08-M

## Department of the Navy

### Naval Research Advisory Committee; Closed Meeting

Notice was published June 9, 1992, at 57 FR 24484 that the Naval Research Advisory Committee Panel on STOV (Short Take-off/Vertical Landing) Strike Fighter (SSF) Replacement Aircraft in the 2010-2020 Timeframe will meet on June 23 and 24, 1992 at the Center for Naval Analyses, 4401 Ford Avenue, Alexandria, Virginia. A new requirement for additional briefings on future program requirements necessitates a change in the date of the meeting. The meeting will be held on June 23, 24, and 25, 1992. All other information in the previous notice remains effective. In accordance with 5 U.S.C. section 552b(e)(2), the meeting change is publicly announced at the earliest practical time.

Dated: June 16, 1992.

**Wayne T. Baucino**

*Lieutenant, JAGC, U. S. Naval Reserve, Alternate Federal Register Liaison Officer.*

[FR Doc. 92-14775 Filed 6-23-92; 8:45 am]

BILLING CODE 3810-AE-F

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP92-190-000]

### Carnegie Natural Gas Co.; Proposed Changes in FERC Gas Tariff

June 18, 1992.

Take notice that Carnegie Natural Gas Company ("Carnegie") on June 16, 1992, tendered for filing as part of its FERC

Gas Tariff, Second Revised Volume No. 1, six copies of the following primary and alternate tariff sheets:

Thirty-Third Revised Sheet No. 8  
Thirty-Third Revised Sheet No. 9  
Alt Thirty-Third Revised Sheet No. 8  
Alt Thirty-Third Revised Sheet No. 9

Carnegie states that pursuant to section 4 of the Natural Gas Act and § 154.63 of the Commission's regulations, it is filing the above tariff sheets to effect a \$0.2550 per Dth decrease in the commodity rate charged to UGI Corporation ("UGI") for sales service under Carnegie's Rate Schedule CDS. The above primary tariff sheets reflect a decrease of \$0.2550 per Dth in the effective commodity rate charged only to UGI under Rate Schedule CDS, whereas the alternate tariff sheets reflect a decrease of \$0.255 per Dth in the effective commodity rate charged to all customers under Carnegie's Rate Schedules CDS and LVWS.

Carnegie requests that the Commission accept the primary tariff sheets to become effective on July 20, 1992. In the event that the primary sheets are not put into effect, Carnegie requests that the alternate tariff sheets become effective on July 20, 1992. Carnegie also requests that in the event the Commission were to determine that it cannot allow the primary tariff sheets to become effective on July 20, 1992, and instead allows the alternate tariff sheets to become effective on July 20, 1992, that the Commission accept the primary tariff sheets for filing, suspend them until November 1, 1992, and establish a proceeding in which the justness and reasonableness of Carnegie's primary tariff sheets can be determined in time for the commencement of the winter heating season. Carnegie also requests, to the extent necessary, a one-day suspension of the proposed rates.

Carnegie states that the reason for the proposed rate decrease is to "cure" an asserted "market out" condition under its CDS service agreement with UGI, and thereby retain UGI as a firm sales customer on Carnegie's system pending the outcome of Carnegie's restructuring proceeding pursuant to Order No. 636. Carnegie states that the service agreement with UGI contains a market out provision that enables UGI to terminate its contract with Carnegie upon giving twelve months' notice that a market out condition has occurred. Carnegie further states that by letter dated April 27, 1992, UGI informed Carnegie that, in its opinion, a market out condition under its contract existed and that it wished to terminate its service agreement with Carnegie effective May 1, 1993. Carnegie also

states that Carnegie's service agreement with UGI permits Carnegie to cure the market out condition by reducing its effective rate to UGI under Rate Schedule CDS and that the rate decrease to UGI proposed in its filing is in furtherance of Carnegie's contractual right to cure the market out condition and retain UGI as a firm customer on Carnegie's system.

Carnegie states that copies of the filing were served upon Carnegie's jurisdictional sales customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capital Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedures 18 CFR 385.211 and 385.214. All such petitions or protests should be filed on or before June 25, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 92-14786 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF92-98-000]

### Fischer Energy, Inc.; Amendment to Filing

June 18, 1992.

On June 16, 1992, Fischer Energy, Inc. (Applicant) tendered for filing amendments to its filing in this docket.

The amendment provides additional information pertaining to the ownership structure of its small power production facility. No determination has been made that the submittal constitutes a complete filing.

Any person desiring to be heard or objecting to the granting of qualifying status should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests must be filed by July 6, 1992, and must be served on the Applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will



not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-14784 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RS92-92-000]

**Jupiter Energy Corp.; Filing**

June 18, 1992.

Take notice that on May 26, 1992, Jupiter Energy Corporation (Jupiter) filed a Request For Determination That Restructuring Proceeding Is Unnecessary. Notice is hereby given that comments on Jupiter's filing are due on or before June 25, 1992.

Lois D. Cashell,

Secretary.

[FR Doc. 92-14785 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-109-009]

**Northern Natural Gas Co.; Proposed Changes in FERC Gas Tariff**

June 18, 1992.

Take notice that Northern Natural Gas Company (Northern), on June 16, 1992, tendered for filing to become part of Northern's F.E.R.C. Gas Tariff, Third Revised Volume No. 1, the following tariff sheet, proposed to be effective April 8, 1992:

Second Substitute Fifth Revised Sheet No. 52F.3a

Northern states that such tariff sheet is being submitted in compliance with the Commission's Order issued June 4, 1992, in Docket No. RP92-109-001, *et al.* to revise the tariff language proposing to implement a request fee for both new and pending firm transportation requests to include the provision that in the event a Shipper withdraws its request for service before Northern tenders a Service Agreement, the request fee plus applicable interest will be refunded to the Shipper, provided that Northern has not constructed facilities for that shipper.

Northern further states that copies of the filing have been mailed to each of its customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance

with rule 211 of the Commission's rules of practice and procedure 18 CFR 385.211. All such protests should be filed on or before June 25, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-14787 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-157-001]

**Pacific Offshore Pipeline Co; Notice of Compliance Filing**

June 18, 1992.

Take notice that on June 10, 1992, Pacific Offshore Pipeline Company (POPCO) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Original Sheet No. 50.

POPCO states that the filing is being made in compliance with Ordering Paragraph (C) of the Commission's order issued June 1, 1992 which directed POPCO to correct referencing errors in the tariff sheet and file the corrected tariff sheet within fifteen days of the date of the order.

POPCO states that copies of the filing is being served on all parties listed on the official service list established in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's rules of practice and procedure 18 CFR 385.211. All such protests should be filed on or before June 25, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-14788 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-166-001]

**Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff**

June 18, 1992.

Take notice that Panhandle Eastern Pipe Line Company (Panhandle) on June

15, 1992, tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

Substitute Original Sheet No. 32-AQ.7

Substitute Original Sheet No. 32-BU.8

Panhandle proposed an effective date of June 1, 1992.

Panhandle states that the tariff sheets are being filed in compliance with an Order issued May 29, 1992, in Docket No. RP92-166-000 which required Panhandle to revise its tariff language to assure the benefits Panhandle receives from retained volumes of unauthorized gas be provided to both sales and transportation customers. Panhandle also states that since Panhandle's original proposal involved only the use of the PGA for sales customers, the most efficient method of reflecting the benefit of retained volumes is to treat such amounts, less applicable penalties, as a refund amount in the Account 858 tracking provisions already in place in Panhandle's tariff for both sales and transportation services. The revised tariff provisions reflect that approach.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before June 25, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-14789 Filed 6-24-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-165-000]

**Trunkline Gas Co.; Technical Conference**

June 18, 1992.

In the Commission's order issued on May 29, 1992, in the above-captioned proceeding, the Commission held that the filing raises issues for which a technical conference is to be convened. The conference to address the issues has been scheduled for Monday, June 29, 1992, at 10 a.m. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 810 First Street NE., Washington, DC 20426.



All interested persons and Staff are permitted to attend.

Lois D. Cashell,  
Secretary.

[FR Doc. 92-14790 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-189-000]

### United Gas Pipe Line Co.; Proposed Changes in FERC Gas Tariff

June 18, 1992.

Take notice that on June 15, 1992, United Gas Pipe Line Company (United) tendered for filing as part of its Third Revised Volume No. 1 FERC Gas Tariff, the following tariff sheets with a proposed effective date of July 15, 1992:

Second Revised Sheet No. 4L  
Original Sheet No. 4M  
Original Sheet No. 4N  
Original Sheet No. 4O  
Original Sheet No. 4P  
Original Sheet No. 4Q

United states that the above-reference tariff sheets is being submitted to comply with the Commission's Notice of Further Extension of Time issued February 11, 1992, for United to file revised tariff sheets to collect from its customers take-or-pay costs billed to United by Sea Robin Pipeline Company (Sea Robin) as required by the Commission's July 18, 1991, Order Denying Requests for Rehearing in the above-captioned proceeding. 56 FERC (CCH) ¶ 61,076 (1991).

United also states that the above-referenced tariff sheets, is in compliance with the Commission's February Order granting rehearing to Texas Transmission Corp (Texas Gas), 54 FERC (CCH) ¶ 61,211, 61,627 (1991), and the subsequent May and July orders denying rehearing of the February order, 55 FERC (CCH) ¶ 61,256 (1991) and 56 FERC (CCH) ¶ 61,076 (1991), reduce by half United's allocation to Texas Gas of Sea Robin take-or-pay costs. The dollars reallocated away from Texas Gas have been spread over United's citygate customers.

United states that copies of the filing were served by first-class mail upon all of its sales customers, interested state commissions and each person listed on the official service list compiled by the secretary in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's

rules and regulations. All such motions or protests should be filed on or before June 25, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,  
Secretary.

[FR Doc. 92-14791 Filed 6-23-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-114-003]

### Williams Natural Gas Co.; Proposed Changes in FERC Gas Tariff

June 18, 1992.

Take notice that Williams Natural Gas Company (WNG) on June 15, 1992 tendered for filing Second Substitute Third Revised Sheet No. 246 to its FERC Gas Tariff, First Revised Volume No. 1, to be effective March 15, 1992.

WNG states that it made a filing on April 7, 1992 in the above referenced docket. By Commission order (order) issued May 18, 1992, WNG was directed to file language, within 30 days of the issuance of the order, giving Authorized Overrun Service the same priority as the underlying transportation agreement. The instant filing is being made to comply with the order.

WNG states that a copy of its filing was served on all jurisdictional customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before June 25, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,  
Secretary.

[FR Doc. 92-14792 Filed 6-27-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TA92-2-49-000 and TM92-7-49-000]

### Williston Basin Interstate Pipeline Co.; Notice of Purchased Gas Cost Adjustment Filing

June 18, 1992.

Take notice that on June 15, 1992, Williston Basin Interstate Pipeline Company (Williston Basin), 200 North Third Street, suite 300, Bismarck, North Dakota 58501, tendered for filing its Annual Purchased Gas Cost Adjustment Filing (PGA) pursuant to 18 CFR 154.301, *et seq.* of the Commission's Regulations, sections 21, 30 and 35 of its FERC Gas Tariff (First Revised Volume No. 1 and Original Volume Nos. 1-A and 1-B, respectively) and the Commission's June 10, 1992 Order in Docket Nos. TA92-1-49-000 and TM92-6-49-000.

The proposed effective date of the tariff sheets is August 1, 1992.

Williston Basin states that 3rd Rev Alt 43rd Revised Sheet No. 10 (First Revised Volume No. 1) reflects a negative 32.273 cents per dkt Current Gas Cost Adjustment applicable to Rate Schedules G-1, SGS-1 and E-1 and a negative 6.372 cents per dkt Surcharge Adjustment applicable to Rate Schedules G-1 and SGS-1. These changes result in an overall 42.345 cents per dkt decrease in the gas commodity cost applicable to Rate Schedules G-1 and SGS-1, as compared to that contained in the Company's April 15, 1992 PGA filing in Docket No. TQ92-3-49-001, which became effective May 1, 1992.

Williston Basin also submitted for filing 3rd Rev Alt 36th Revised Sheet No. 11, 3rd Rev Alt 41st Revised Sheet No. 12 and 2nd Rev Alt 22nd Revised Sheet No. 97A (Original Volume No. 1-A), 3rd Rev Alt 31st Revised Sheet Nos. 10 and 11 (Original Volume No. 1-B), 3rd Rev Alt 43rd Revised Sheet No. 10 and 3rd Rev Alt 37th Revised Sheet No. 11B (Original Volume No. 2) which reflect revisions to the fuel reimbursement charge, percentage and surcharge components of the Company's relevant gathering, transportation and storage rates as compared to that contained in the Company's April 15, 1992 filing in Docket No. TQ92-3-49-001 which were effective May 1, 1992.

In light of the Commission's May 29,



1992 Order in Docket Nos. RP92-163- and RP92-170-000 accepting the Alternate tariff sheets effective June 1, 1992, the tariff sheets enclosed in the Company's filing contain the accepted alternate base tariff rates and throughput surcharge rates filed in Docket Nos. RP92-163-000, RP92-170-000 and TM92-5-49-000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's rules of practice and procedure 18 CFR 385.211 and 385.214. All such motions or protests should be filed on or before July 6, 1992. Protests will be considered by the Commission.

Lois D. Cashell,  
Secretary.

[FR Doc. 92-14793 Filed 6-23-92; 8:45 am]  
BILLING CODE 6717-01-M

#### Office of Fossil Energy

[FE Docket No. 92-61-NG]

#### P.M.I. Comercio Internacional, S.A. De C.V., Application for Blanket Authorization To Export Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt on May 14, 1992, as revised on May 15 and June 12, 1992, of an application filed by P.M.I. Comercio Internacional, S.A. de C.V. (PMI) for blanket authorization to export natural gas from the United States to Mexico for a two-year period beginning on the date of first delivery. PMI proposes to export up to 219 Bcf of natural gas during the first year and 292 Bcf of natural gas during the second year. The proposed exports would take place at any point on the international border where existing pipeline facilities are located. PMI would file quarterly reports detailing any transactions.

The application is filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204-111 and 0204-127. Protests, motions to intervene, notices of intervention, and written comments are invited.

**DATE:** Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., eastern time, July 24, 1992.

**ADDRESS:** Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F-056, FE-50, 1000 Independence Avenue SW., Washington, DC 20585.

#### FOR FURTHER INFORMATION:

Peter Lagiovane, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F-056, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-8116  
Diane Stubbs, Office of Assistant General Counsel for Fossil Energy, U.S. Department of Energy, Forrestal Building, room 6E-042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-6667.

**SUPPLEMENTARY INFORMATION:** PMI is a Mexican corporation controlled by Petroleos Mexicanos (PEMEX), Mexico's state-owned oil and natural gas company. It is an international marketer of crude oil, natural gas, and other petroleum products. Natural gas exported under the requested authorization would be exported either for PMI's own account or on behalf of its parent, PEMEX, its affiliate, PMI Trading, Limited (Trading) or other PMI affiliates. PMI's application states that the exported gas would come from production areas in the United States with surplus supplies of natural gas or would consist of supplies which are incremental to the needs of current purchasers. No contracts for the sale of the proposed exports have been executed, however, the specific details of each export transaction would be filed by PMI in conformity with DOE's quarterly reporting requirements. PMI anticipates all sales would result from arms-length negotiations and the prices would be determined by market conditions.

This export application will be reviewed under section 3 of the NGA and the authority contained in DOE Delegation Order Nos. 0204-111 and 0204-127. In deciding whether the proposed export of natural gas is in the public interest, domestic need for the gas will be considered, and any other issue determined to be appropriate, including whether the arrangement is consistent with the DOE policy of promoting competition in the natural gas marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties, especially those that may oppose this application, should comment on these matters as they relate to the requested export authority. The applicant asserts that there is no current need for the domestic gas that would be exported under the proposed arrangement. Parties opposing

this arrangement bear the burden of overcoming this assertion.

**NEPA Compliance.** The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed actions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

**Public Comment Procedures.** In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have their written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR Part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the address listed above.

It is intended that a decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.



If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of PMI's application is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056 at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on June 19, 1992.

**Charles F. Vacek,**

*Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.*

[FR Doc. 92-14856 Filed 6-23-92; 8:45 am]

BILLING CODE 6450-01-M

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-4146-8]

**Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee; FY 91 Grant Performance Reports**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability of grantee performance evaluation reports.

**SUMMARY:** EPA's grant regulations (40 CFR 35.150) require the Agency to evaluate the performance of agencies which receive grants. EPA's regulations for regional consistency (40 CFR 56.7) require that the Agency notify the public of the availability of the reports of such evaluations. EPA recently performed end-of-year evaluations of eight state air pollution control programs (Alabama Department of Environmental Management, Florida Department of Environmental Regulation, Georgia Environmental Protection Division, Kentucky Department for Environmental Protection, Mississippi Bureau of Pollution Control, North Carolina Department of Environment, Health, and Natural Resources, South Carolina Department of Health and Environmental Control and Tennessee Department of Conservation and Environment), and 16 local programs (Knox County Department of Air Pollution Control, Chattanooga-Hamilton County Air Pollution Control Bureau, Memphis-Shelby County Health Department, Nashville-Davidson County Metropolitan Health Department, Jefferson County Air Pollution Control

District, Western North Carolina Regional Air Pollution Control Agency, Mecklenburg County Department of Environmental Protection, Forsyth County Environmental Affairs Department, Palm Beach County Public Health Unit, Hillsborough County Environmental Protection Commission, Dade County Environmental Resources Management, Jacksonville Air Quality Division, Broward County Environmental Quality Control Board, Pinellas County Department of Environmental Management, City of Huntsville Department of Natural Resources, Jefferson County Department of Health). These audits were conducted to assess the agencies' performance under the grants made to them by EPA pursuant to section 105 of the Clean Air Act. EPA Region IV has prepared reports for the twenty-four agencies identified above and these 105 reports are now available for public inspection.

**ADDRESSES:** The reports may be examined at the EPA's Region IV office, 345 Courtland Street, NE., Atlanta, Georgia 30365, in the Air, Pesticides, and Toxics Management Division.

### FOR FURTHER INFORMATION CONTACT:

Linda Thomas for information concerning the States of Alabama, Florida, Mississippi, and Georgia. Vera Bowers for information concerning the States of Kentucky, North Carolina, South Carolina, and Tennessee.

**Patrick M. Tobin,**

*Acting Regional Administrator.*

[FR Doc. 92-14845 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4147-1]

## Science Advisory Board; Environmental Economics Advisory Committee; Open Meeting

Under Public Law 92-463, notice is hereby given that the Environmental Economics Advisory Committee (EEAC) of the Science Advisory Board will meet on July 14 and 15, 1992 at the Howard Johnson National Airport Hotel, 2650 Jefferson Davis Highway, Arlington VA 22202. The hotel telephone number is (703) 684-7200.

The meeting, which is open to the public, will start at 9 a.m. each day, and adjourn no later than 5 p.m. each day.

The main purpose of the meeting is to continue discussion (initiated at the Committee's previous meeting of April 15, 1992) of the study *Environmental and Resource Accounting in the Chesapeake Bay Region* (see the *Federal Register* for March 19, 1992, p. 9550 for availability of this document), and to discuss possible topics for future meetings. The

Committee will also be briefed by staff of the Office of Policy, Planning and Evaluation on current EPA studies addressing the issues of macroeconomic impacts of the potential physical effects of climate change, and the impacts of the cost of environmental/health regulations on the public's access to health care (known as the "health-health choice").

An agenda for the meeting is available from Ms. Mary Winston, Staff Secretary, Science Advisory Board (A101F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington DC 20460 (202-260-6552). Members of the public desiring additional information about the conduct of the meeting should contact Mr. Samuel Rondberg, Designated Federal Official, Environmental Economics Advisory Committee, by telephone at the number noted above or by mail to the address noted above. Anyone wishing to make a presentation at the meeting should forward a written statement (35 copies) to Mr. Rondberg by July 10, 1992. The Science Advisory Board expects that the public statements presented at its meetings will not be repetitive of previously submitted written statements. In general, each individual or group making an oral presentation will be limited to a total time of ten minutes.

Dated: June 16, 1992.

**Donald G. Barnes,**

*Staff Director, Science Advisory Board.*

[FR Doc. 92-14854 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-M

[OPP-00334; FRL-4075-5]

## State FIFRA Issues Research and Evaluation Group (SFIREG); Open Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The State FIFRA Issues Research and Evaluation Group (SFIREG) will hold a 2-day meeting, beginning on July 13, 1992, and ending on July 14, 1992. This notice announces the location and times for the meeting and sets forth tentative agenda topics. The meeting is open to the public.

**DATES:** The SFIREG will meet on Monday, July 13, 1992, from 8:30 a.m. to 5 p.m. and on Tuesday, July 14, 1992, beginning at 8:30 a.m. and adjourning at approximately noon.

**ADDRESSES:** The meeting will be held at: DoubleTree Hotel National Airport-



Crystal City, 300 Army/Navy Drive, Arlington, VA, (703) 892-4100.

**FOR FURTHER INFORMATION CONTACT:** By mail: Arty Williams, Office of Pesticide Programs (H7506C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 1109, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305-7371.

**SUPPLEMENTARY INFORMATION:** The tentative agenda of SFIREG includes the following:

1. Regional SFIREG reports.
2. Reports from the SFIREG Working Committees.
3. Update on activities of Registration Division, Office of Pesticide Programs.
4. Update on activities of the Special Review and Reregistration Division, Office of Pesticide Programs.
5. Update on activities of the Office of Compliance Monitoring.
6. Update on 40 CFR Part 165 - Phases II and III.
7. Update on activities of the Field Operations Division.
8. Other topics as appropriate.

Dated: June 15, 1992.

Douglas D. Camp,

Director, Office of Pesticide Programs.

[FR Doc. 92-14743 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-F

[OPP-50740; FRL-4056-1]

# **Receipt of Notification of Intent to Conduct Small-Scale Field Testing; Genetically Altered Microbial Pesticides**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has received from Ecogen, Inc. a notification of intent to conduct small-scale field tests involving certain genetically engineered *Bacillus thuringiensis* strains. This is a generic Notification submitted in lieu of separate Notifications for each of several essentially similar tests.

**DATES:** Written comments must be received on or before July 24, 1992.

**ADDRESSES:** Comments in triplicate, should bear the docket control number OPP-50740 and be submitted to: Public Response and Program Resources Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1128, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment(s) concerning this Notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. Information on the proposed test and all written comments will be available for public inspection in Rm. 1128 at the Virginia address given above from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** By mail: Phil Hutton, Product Manager (PM) 18, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 207, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-305-7690).

**SUPPLEMENTARY INFORMATION:** A notification of intent to conduct small-scale field testing pursuant to EPA's "Statement of Policy; Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act" of June 26, 1986 (51 FR23313) has been received from Ecogen, Inc. of Longhorne, PA. This notification is intended as a generic Notification for testing certain *Bacillus thuringiensis* strains. Ecogen contends that experimental use permits are not warranted for small-scale testing of these *Bacillus thuringiensis* strains for the reasons listed below:

1. The genetically engineered *Bacillus thuringiensis* strains were constructed using naturally occurring, exotoxin-negative *Bacillus thuringiensis* strain parental backgrounds, or plasmid cured derivatives thereof, including strains of the subspecies *kurstaki* and *morrisoni*.
2. The recombinant plasmids harbored by the genetically engineered *Bacillus thuringiensis* strains are comprised of fully characterized *Bacillus thuringiensis* plasmid replication origins that are not functional in *E. coli* or other gram-negative bacteria. Further, with the exception of an antibiotic resistance marker (e.g., *cat*) and the *lacZ* coding region, there is no genetic information foreign to *Bacillus thuringiensis* in the recombinant strains.
3. The crystal protein genes carried by the recombinant plasmids are unaltered naturally occurring *Bacillus thuringiensis* crystal protein genes that are not truncated.

4. The recombinant plasmids harbored by the genetically engineered *Bacillus thuringiensis* strains are severely reduced in their ability to be transferred conjugatively.

5. Field testing of individual strains will occur on a total area of less than 10 acres and the test crop will be destroyed.

Following the review of the Ecogen, Inc. application and any comments received in response to this Notice, EPA will decide whether or not experimental use permits are required for small-scale testing involving these *Bacillus thuringiensis* strains.

Dated: June 13, 1992.

Stephanie R. Irene,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 92-14847 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-F

[PP 1G3956/T625; FRL 4069-5]

# **Pyridate; Establishment of Temporary Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has established a temporary tolerance for the combined residues of the herbicide pyridate and its main metabolite CL-9673 (3-phenyl-4-hydroxy-6-chloropyridazine) and conjugates of CL-9673, in or on the raw agricultural commodity cabbage (with and without wrapper leaves) at 0.03 part per million (ppm).

**DATES:** This temporary tolerance expires April 24, 1994.

**FOR FURTHER INFORMATION CONTACT:** By mail: Cynthia Giles-Parker, Product Manager (PM) 22, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 229, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, 703-305-5540.

**SUPPLEMENTARY INFORMATION:** Agrolinz, Inc., 1755 N. Kirby Parkway, Suite 300, Memphis, TN 38120-4393, has requested in pesticide petition (PP) 1G3956, the establishment of a temporary tolerance for the combined residues of the herbicide Pyridate [O(3-phenyl-6-chloropyridazin-4-yl)-S-n-octyl-thiocarbonate] and its main metabolite CL-9673 (3-phenyl-4-hydroxy-6-chloropyridazine) and conjugates of CL-9673, in or on the raw agricultural commodity cabbage (with and without wrapper leaves) at 0.03 part per million (ppm). This temporary tolerance will permit the



marketing of the above raw agricultural commodity when treated in accordance with the provisions of the experimental use permit 42545-EUP-3, which is being issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (Pub. L. 95-396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that establishment of the temporary tolerance will protect the public health. Therefore, the temporary tolerance has been established on the condition that the pesticide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active ingredient to be used must not exceed the quantity authorized by the experimental use permit.

2. Agrolinz, Inc., must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

This tolerance expires April 24, 1994. Residues not in excess of this amount remaining in or on the raw agricultural commodity after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerance. This tolerance may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirement of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

Authority: 21 U.S.C. 346a(j).

Dated: June 5, 1992.

Stephanie R. Irene,  
Acting Director, Registration Division, Office  
of Pesticide Programs.

[FR Doc. 92-14744 Filed 6-23-92; 8:45 am]

BILLING CODE 6560-50-F

[OPPTS-400064; FRL-4059-2]

### Emergency Planning and Community Right-to-Know; Availability of Guidance Document

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability.

**SUMMARY:** EPA has prepared a guidance document on the hydrochlorofluorocarbons (HCFCs) that are proposed to be added to the list of toxic chemicals under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). The proposal is published elsewhere in this issue of the *Federal Register*. EPA is proposing that the HCFCs be added to the EPCRA section 313 list as a category. The guidance document lists many of the individual HCFCs that are covered by the category proposed by the Agency. EPA intends that this guidance document will be used when the HCFC proposal is promulgated.

**DATES:** Written comments must be received by August 24, 1992.

**ADDRESSES:** Written comments on the "Guidance Document" should be submitted in triplicate to: OPPT Docket Clerk, TSCA Public Docket Office, TS-793, Environmental Protection Agency, Rm. NE-G004, 401 M St., SW., Washington, DC 20460, Attn: Docket Number OPPTS-400064.

**FOR FURTHER INFORMATION CONTACT:** Maria J. Doa, Petitions Coordinator, Emergency Planning and Community Right-to-Know Information Hotline, Environmental Protection Agency, Mail Stop OS-120, 401 M St., SW., Washington, DC 20460, Toll free: 800-535-0202, In Washington, DC and Alaska, 703-920-9877.

**SUPPLEMENTARY INFORMATION:** The guidance document prepared by EPA was developed as the result of the review of a petition to add hydrochlorofluorocarbons (HCFCs) to the list of toxic chemicals under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). The guidance document contains a list of the HCFCs identified to date that are covered by the category proposed by the Agency. Also included are the chemical name, the Chemical Abstracts Service (CAS) number for

those that apply, and a description of the chemical formula the Agency is using to define the category. In the event of a conflict between the chemical formula and the list in this guidance, EPA intends the chemical formula to govern. Copies of this guidance document may be obtained by calling the Emergency Planning and Community Right-to-Know Information Hotline listed under the FOR FURTHER INFORMATION CONTACT unit of this notice.

Dated: June 3, 1992.

Victor J. Kimm,  
Acting Assistant Administrator for  
Prevention, Pesticides and Toxic Substances.  
[FR Doc. 92-14100 Filed 6-23-92; 8:45 am]  
BILLING CODE 6560-50-F

[OPPTS-59309; FRL 4075-8]

### Certain Chemicals; Test Market Exemption Applications

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA may upon application exempt any person from the premanufacturing notification requirements of section 5(a) or (b) of the Toxic Substance Control Act (TSCA) to permit the person to manufacture or process a chemical for test marketing purposes under section 5(h)(1) of TSCA. Requirements for test marketing exemption (TME) applications, which must either be approved or denied within 45 days of receipt are discussed in EPA's final rule published in the *Federal Register* of May 13, 1983 (48 FR 21722). This notice, issued under section 5(h)(6) of TSCA, announces receipt of 2 applications for exemption, provides a summary, and requests comments on the appropriateness of granting these exemptions.

**DATES:**

Written comments by:  
T 92-13, 92-14, July 11, 1992.

**ADDRESSES:** Written comments, identified by the document control number "(OPPTS-59309)" and the specific TME number should be sent to: Document Processing Center (TS-790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW, Rm. 201ET, Washington, DC 20460, (202) 260-1532.

**FOR FURTHER INFORMATION CONTACT:** Susan B. Hazen, Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm.



E-545, 401 M St., SW, Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

**SUPPLEMENTARY INFORMATION:** The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer of the TME received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office NE-G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

#### T 92-13

*Close of Review Period.* July 25, 1992.

*Importer.* Confidential.

*Chemical.* (G) 2-Propenamide, copolymer with cationic monomer.

*Use/Import.* (S) Retention/drainage aid in papermaking. Import range: Confidential.

*Toxicity Data.* Acute oral toxicity: 7,396 mg/kg species (rat). Static acute toxicity: 3.8ppm 48h species (Japanese killfish). Skin irritation: none species (rabbit). Mutagenicity: negative.

#### T 92-14

*Close of Review Period.* July 25, 1992.

*Importer.* Confidential.

*Chemical.* (G) 2-Propenamide, copolymer with cationic monomer.

*Use/Import.* (S) Retention/drainage aid in papermaking. Import range: Confidential.

*Toxicity Data.* Acute oral toxicity: 7,396 mg/kg species (rat). Static acute toxicity: 3.8ppm 48h species (Japanese killfish). Skin irritation: none species (rabbit). Mutagenicity: negative.

Dated: June 18, 1992.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 92-14851 Filed 6-23-92 8:45 am]

BILLING CODE 6560-50-F

### FEDERAL COMMUNICATIONS COMMISSION

[Report No. 1896]

#### Petitions for Reconsideration and Clarification of Actions in Rule Making Proceedings

June 18, 1992.

Petitions for reconsideration and clarification have been filed in the Commission rule making proceeding listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of this document is available for viewing and copying in room 239, 1919 M Street NW.,

Washington, DC, or may be purchased from the Commission's copy contractor Downtown Copy Center (202) 452-1422. Oppositions to these petitions must be filed July 9, 1992.

See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services. (GEN Docket No. 90-217). Number of Petitions Received: 3.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-14773 Filed 6-23-92; 8:45 am]

BILLING CODE 6712-01-M

### FEDERAL RESERVE SYSTEM

#### Hansen-Lawrence Agency, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than July 17, 1992.

**A. Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Hansen-Lawrence Agency, Inc.*, Worden, Montana; to acquire an additional 33.20 percent, for a total of 81.2 percent, of the voting shares of

Farmers State Bank of Worden, Worden, Montana.

**B. Federal Reserve Bank of Kansas City** (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Farmers State Bancshares of Andrew County, Inc.*, Savannah, Missouri; to become a bank holding company by acquiring 80.85 percent of the voting shares of Farmers State Bank of Rosendale, Savannah, Missouri.

Board of Governors of the Federal Reserve System, June 18, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-14802 Filed 6-23-92; 8:45 am]

BILLING CODE 6210-01-F

#### NBD Bancorp, Inc., et al.; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; and Acquisitions of Nonbanking Companies

The companies listed in this notice have applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed companies have also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The applications are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a



hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than July 17, 1992.

**A. Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. **NBD Bancorp, Inc.**, Detroit, Michigan, and **NBD Indiana, Inc.**, Detroit, Michigan; to acquire 100 percent of the voting shares of **INB Financial Corporation**, Indianapolis, Indiana, and thereby indirectly acquire **INB National Bank**, Indianapolis, Indiana, **INB Banking Company**, Jeffersonville, Indiana, **INB Banking Company**, North, Chesterton, Indiana, **INB Banking Company**, Southwest, Evansville, Indiana, **INB Banking Company**, Northeast, Fort Wayne, Indiana, and **INB National Bank**, Northwest, Lafayette, Indiana.

In connection with this application, Applicants also propose to acquire **INB Brokerage Services, Inc.**, Indianapolis, Indiana, and thereby engage in discount brokerage services, pursuant to § 225.25(b)(15) of the Board's Regulation Y; **Consumer Marketing Services, Inc.**, Indianapolis, Indiana, and thereby engage in credit life insurance, pursuant to § 225.25(b)(8) of the Board's Regulation Y; **INB Mortgage Corporation**, Indianapolis, Indiana, and thereby engage in originating and placing residential and commercial mortgage loans, pursuant to § 225.25(b)(1) of the Board's Regulation Y; and **INB Neighborhood Revitalization Corporation**, Indianapolis, Indiana, and thereby engage in providing financial tools to neighborhood groups to support community reinvestment efforts, pursuant to § 225.25(b)(6) of the Board's Regulation Y.

**B. Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. **Hansen-Lawrence Agency, Inc.**, Worden, Montana; to acquire 100 percent of the voting shares of **First Hysham Holding Company**, Hysham, Montana, and thereby indirectly acquire **First National Bank in Hysham**, Hysham, Montana.

In connection with this application, Applicant also proposes to acquire **First Insurance Agency, Inc.**, Hysham, Montana, and thereby engage in general insurance agency activities, pursuant to § 225.25(b)(8)(iii)(A) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, June 18, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-14803 Filed 6-23-92; 8:45 am]

BILLING CODE 3210-01-F

#### **Thomas Michael Turner, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies**

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than July 14, 1992.

**A. Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303:

1. **Thomas Michael Turner**, Decatur, Alabama; to acquire an additional 4.9 percent, for a total of 12.6 percent, of the voting shares of **BankersTrust of Alabama, Inc.**, Madison, Alabama, and thereby indirectly acquire **Bankers Trust of Madison**, Madison, Alabama.

**B. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. **Leonard C. Hudson**, Pampa, Texas; to acquire an additional 16.5 percent, for a total of 41.2 percent, of the voting shares of **NBC Bancshares, Inc.**, Pampa, Texas, and thereby indirectly acquire **National Bank of Commerce**, Pampa, Texas.

Board of Governors of the Federal Reserve System, June 18, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92-14804 Filed 6-23-92; 8:45 am]

BILLING CODE 3210-01-F

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

##### **Food and Drug Administration**

##### **Temporarily Reduced Services of the Dockets Management Branch on July 15 and 16, 1992**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration is announcing the partial closing of the Dockets Management Branch (DMB) on July 15 and 16, 1992. The public reading room will be open from 9 a.m. to 4 p.m. on both days, but it will offer only limited services. Other offices of DMB will be closed both days while employees attend a training program.

**FOR FURTHER INFORMATION CONTACT:** Linda M. Quinones or Jennie C. Butler, Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., 301-443-7542.

**SUPPLEMENTARY INFORMATION:** DMB, which is part of the Office of Management, is responsible for many activities under 21 CFR 10.20. Major functions of DMB include:

- (1) Serving as the entry point for citizens petitions, comments, hearing requests, and other documents used in FDA rulemaking and administrative activities;
- (2) Making these documents available for inspection by operating a public reading room;
- (3) Providing copies of the official records maintained by DMB in accordance with the Freedom of Information Act; and
- (4) Providing advice and guidance regarding filing requirements pertaining to the documents handled by DMB.

Most offices of DMB will be closed July 15 and 16, 1992, so that its employees may attend a training program. However, the public reading room will be open from 9 a.m. to 4 p.m. on both days. There will be two employees working both days to answer telephones and to accept hand-delivered comments, documents, and copy requests. Due to the understaffing of the office on both days, access to and copying of documents will be limited to documents on file in the public reading room. Normal operations of DMB will resume on July 17, 1992.

DMB is located in rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857. The telephone number for the office is 301-443-7542.



Dated: June 17, 1992.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 92-14776 Filed 6-23-92; 8:45 a.m.]

BILLING CODE 4160-01-F

## Health Care Financing Administration

[ORD-064-CN]

### Medicare and Medicaid Programs; Small Business Innovation Research Grants for Fiscal Year 1992; Correction

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Notice; correction.

**SUMMARY:** In the April 15, 1992 issue of the *Federal Register* (FR Doc. 92-8625) (57 FR 13106), we published a notice that announced the availability of HCFA funding, through grants, for small businesses under the Small Business Innovation Research Program. The notice contained information about the subject areas for grants that will be given priority, application requirements, review procedures, and other relevant information. This notice corrects errors made in that document.

**DATES:** Grant applications must be submitted by July 14, 1992 in order to be considered under the fiscal year 1992 annual funding cycle.

**FOR FURTHER INFORMATION CONTACT:** Sydney P. Galloway, (410) 966-6645.

**SUPPLEMENTARY INFORMATION:** As published, the April 15, 1992 notice (FR Doc. 92-8625) (57 FR 13106), concerning the availability of small business innovation research grants for fiscal year 1992, contains errors that may prove to be misleading and are in need of clarification. Accordingly, we are making the following corrections to the April 15, 1992 notice.

1. On page 13106, in the third column, under "FOR FURTHER INFORMATION CONTACT," seventh line, the word "Building," is changed to read "Boulevard."

2. On page 13107, in the first column, under "Phase II", the last line of the first paragraph, the word "perfect." is changed to read "project."

3. On page 13107, in the first column, under "Phase II", the second paragraph, the second line, "\$10,000" is changed to read "\$100,000".

4. On page 13107, in the third column, the second full paragraph, the ninth line, the word "subcontractors," is changed to read "subcontracts."

5. On page 13110, in the first column, under "A. Awards", the fifth bullet, which reads:

"• In accordance with the administration of grant regulations, specifically 45 CFR 74.705, no fee or profit will be furnished.", is removed and a new bullet is added to read as follows:

"• The SBA Program Policy Directive does permit the payment of a reasonable fee or profit under the SBIR Program."

This correction is necessary to implement the policy directive on the Small Business Innovative Research Program that provides for a fee or profit. (See 53 FR 23829, June 24, 1988.) This correction is also necessary to be consistent with section VI.E. entitled "Profit or Fee" on page 13110 of the April 15, 1992 notice.

6. On page 13111, in the first column, the fifteenth line from the bottom, in the entry that begins "42 CFR", the phrase "42 CFR part 52" is changed to read "42 CFR 52.2".

7. On page 13111, in the first column, the ninth line from the bottom, the title number "45" is added to precede the acronym "CFR".

8. On page 13111, in the second column, under "I. Cost Sharing", the first line, the second use of the word "not" is changed to read "nor".

9. On page 13111, in the second column, under "J. Additional Information", the second line of the last paragraph, the number "1372," is changed to read "12372,".

10. On page 13111, in the third column, under "A. High Quality/Effective Care", the third line from the bottom of the paragraph, the word "are" is changed to read "care".

(Catalog of Federal Domestic Assistance Program No. 93.779, Health Financing Research, Demonstrations and Experiments)

Dated: June 18, 1992.

Neil J. Stillman,

Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 92-14814 Filed 6-23-92; 8:45 am]

BILLING CODE 4120-01-M

## National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Meeting: AIDS Research Advisory Committee, NIAID

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the AIDS Research Advisory Committee, National Institute of Allergy and Infectious Diseases, on August 3-4, 1992, at the National Institutes of Health, Building 31C, Conference Room 10, Bethesda, Maryland 20892.

The entire meeting will be open to the public from 9 a.m. to 5 p.m. on August 3 and from 8:30 a.m. to adjournment on

August 4. The AIDS Research Advisory Committee advises and makes recommendations to the Director, National Institute of Allergy and Infectious Diseases, on all aspects of research on HIV and AIDS related to the mission of the Division of AIDS (DAIDS). The Committee is currently focusing its attention on clinical treatment research programs sponsored by DAIDS, the assessment of alternative and complementary therapies, the dissemination of information on research results and clinical trials to physicians and patients, and the implementation of expanded access programs. Attendance by the public will be limited to space available.

Ms. Patricia Randall, Office of Communications, National Institute of Allergy and Infectious Diseases, Building 31, room 7A32, National Institutes of Health, Bethesda, Maryland 20892, telephone (301-496-5717), will provide a summary of the meeting and a roster of the committee members upon request.

Jean S. Noe, Executive Secretary, AIDS Research Advisory Committee, Division of Acquired Immunodeficiency Syndrome, NIAID, NIH, Solar Building, room 2A22, telephone (301-496-0545), will provide substantive program information.

(Catalog of Federal Domestic Assistance Program Nos. 93.855, Immunology, Allergic and Immunologic Diseases Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health).

Dated: June 17, 1992.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 92-14846 Filed 6-23-92; 8:45 am]

BILLING CODE 4140-01-M

## Public Health Service

### Health Resources and Services Administration; Statement of Organization, Functions and Delegations of Authority

Part H, chapter HB (Health Resources and Services Administration) of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (47 FR 39409-24, August 31, 1982), as amended most recently in pertinent part at 57 FR 6509-12, February 25, 1992) is amended to reflect the revision of the Division of National Health Service Corps in the Bureau of Health Care Delivery and Assistance, within the Health Resources and Services Administration (HRSA).



Under HB-10, Organization and Functions, amend the Bureau of Health Care Delivery and Assistance (HBC), as follows:

1. Delete the Division of National Health Service Corps (HBC6) functional statement in its entirety and insert the following:

*Division of National Health Service Corps (HBC6).* Responsible for carrying out the Bureau's nationwide efforts to improve the organization, recruitment, retention, and placement of health care professionals in underserved and unserved communities. Specifically:

(1) Directs nationwide efforts to improve the availability and distribution of health care delivery professionals;

(2) Plans, directs, administers and coordinates clinical services and related professional health care activities at the national level;

(3) Coordinates with the Office of Program and Policy Development (OPPD) in the development of legislative proposals;

(4) Directs and implements policies and long-range/short-range goals and objectives for programs and activities related to the National Health Service Corps;

(5) Administers programs for recruitment/placement of volunteer health professionals, placement of NHSC Scholarship obligors and Loan Repayment recipients, Private Practice Option loans for NHSC scholarship or Loan Repayment obligors and Start-up loans for NHSC sites;

(6) Provides coordination with other programs providing health services, including voluntary, official and other community agencies;

(7) Establishes and provides liaison in program matters within the Bureau, Department and other Federal agencies, consumer groups and national organizations concerned with health matters, and through the Regional Offices with State and local governments;

(8) Plans, develops and implements State and local clinical and programmatic consultation and assistance programs to improve the quality and effectiveness of patient care delivery systems for underserved population groups, and improve the quality of staffing and knowledge of specific types of health care delivery providers;

(9) Coordinates with the Associate Bureau Director for Information Resources Management and Analysis, the Office of Program Data, and the Office of Data Management in the development of program data needs, formats and reporting requirements

including collection, collation, analysis and dissemination of data;

(10) Participates in the development of forward plans, legislative proposals and budgets;

(11) Coordinates activities and serve as Executive Secretary of the National Advisory Council of the NHSC;

(12) Coordinates the HRSA and/or BHCDA minority affairs activities;

(13) and coordinates with the Office of the General Counsel in facilitating the management of Department of Justice cases.

Dated: June 15, 1992.

Robert G. Harmon,

Administrator, Health Resources and Services Administration.

[FR Doc. 92-14809 Filed 6-23-92; 8:45 am]

BILLING CODE 4160-15-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[AK-967-4230-15; AA-8447-B and AA-8447-A2]

#### Notice for Publication, Cancelled; Alaska Native Claims Selection

On June 17, 1992, in accordance with the provisions of title 43 Code of Federal Regulations subpart A, § 4.5, the Secretary of the Interior, assumed jurisdiction over the decision of June 8, 1992, issued by the Bureau of Land Management, Alaska State Office, approving patent of lands to The Eyak Corporation under village selection applications AA-8447-B and AA-8447-A2 filed pursuant to secs. 12(a) and (b) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, *et seq.* The Secretary has affirmed the Bureau of Land Management's decision in this matter as final for the Department of the Interior effective June 17, 1992.

Notice of the decision published June 10, 1992, (Volume 57, Number 112 FR 24649) is hereby cancelled. No further publications will occur.

Elizabeth P. Carew,

Acting Chief, Branch of KCS Adjudication.

[FR Doc. 92-14801 Filed 6-23-92; 8:45 am]

BILLING CODE 4310-JA-M

#### Utah—Notice of Invitation To Participate in Coal Exploration Program; Cyprus Plateau Coal Company—UTU-69099

Cyprus Plateau Coal Company is inviting all qualified parties to participate in its proposed exploration of certain Federal coal deposits near the Wild Cattle Hollow area, six miles west

of Hiawatha, Utah. The lands are located in Carbon and Emery Counties, Utah, and are described as follows:

T. 14 S., R. 7 E., SLM, Utah

Secs. 27, 28, and 33, all;

Sec. 34, lots 1, 2, N½, N½SW¼.

T. 15 S., R. 7 E., SLM, Utah

Sec. 3, lots 3-6, 11, 12, SW¼, W½W½S

E½;

Secs. 4 and 9, all;

Sec. 10, W½NW¼NE¼, SW¼NE¼, W½,

W½, SE¼;

Sec. 15, W½E½E½, W½E½, W½;

Secs. 16, and 21, all;

Sec. 22, W½E½NE¼NE¼, W½NE¼NE¼,

W½NE¼, SE¼NE¼, W½, SE¼.

Containing 7,176.32 acres

Any party electing to participate in the exploration program must send written notice of such election to the Bureau of Land Management, Utah State Office, P.O. Box 45155, Salt Lake City, Utah 84145-0155, and to Cyprus Plateau Coal Company, P.O. Box PMC, Price, Utah 84501. Such written notice must be received within thirty days after publication of this notice in the Federal Register.

Any party wishing to participate in this exploration program must be qualified to hold a lease under the provisions of 43 CFR 3472.1 and must share all cost on a pro rata basis. A copy of the exploration plan, as submitted by Cyprus Plateau Coal Company, is available for public review during normal business hours in the BLM Office, (Public Room, Fourth Floor), 324 South State Street, Salt Lake City, Utah under Serial Number UTU-69099.

Ted D. Stephenson,

Chief, Branch of Lands and Minerals Operations.

[FR Doc. 92-14808 Filed 6-23-92; 8:45 am]

BILLING CODE 4310-DQ-M

[AZ-020-20, 5410-10-A018; AZA-26580]

#### Receipt of Conveyance of Mineral Interest Application

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Minerals Segregation.

**SUMMARY:** The private lands described in this notice, aggregating approximately 9020 acres, are segregated and made unavailable for filings under the general mining laws and the mineral leasing laws to determine their suitability for conveyance of the reserved mineral interest pursuant to section 209 of the Federal Land Policy and Management Act of October 21, 1976.

The mineral interests will be conveyed in whole or in part upon favorable mineral examination.



The purpose is to allow consolidation of surface and subsurface of minerals ownership where there are no known mineral values or in those instances where the reservation interferes with or precludes appropriate nonmineral development and such development is a more beneficial use of the land than the mineral development.

#### FOR FURTHER INFORMATION CONTACT:

Vivian Reid, Land Law Examiner,  
Phoenix District Office, 2015 West Deer  
Valley Road, Phoenix, Arizona 85027,  
(602) 863-4464. Serial Number AZA-  
26580.

Gila and Salt River Base and Meridian,  
Yavapai County, Arizona

T. 9 N., R. 2 W.,

Sec. 8, SW $\frac{1}{4}$ SW $\frac{1}{4}$

Sec. 31, NW $\frac{1}{4}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NE $\frac{1}{4}$ .

T. 9 N., R. 3 W.,

Sec. 1, lots 1 to 3, incl. S $\frac{1}{2}$ NE $\frac{1}{4}$ ,

SE $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ .

Sec. 12, All.

Sec. 13, All.

Sec. 14, SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ SE $\frac{1}{4}$ .

Sec. 14, S $\frac{1}{2}$ NW $\frac{1}{4}$  and W $\frac{1}{2}$ NE $\frac{1}{4}$  excluding  
all lands within the Hassayampa Canyon  
Wilderness Area.

Sec. 22, E $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ ,

E $\frac{1}{2}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ .

Sec. 23, All.

Sec. 24, lots 1 to 3, incl., N $\frac{1}{2}$ , SW $\frac{1}{4}$ ,

NE $\frac{1}{4}$ SE $\frac{1}{4}$ .

Sec. 25, lots 1 and 2, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ ,  
W $\frac{1}{2}$ , SE $\frac{1}{4}$ .

Sec. 26, All.

Sec. 27, N $\frac{1}{2}$ .

Sec. 35, N $\frac{1}{2}$ .

T. 10, R. 3 W.,

Sec. 10, NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ .

Sec. 11, SE $\frac{1}{4}$ SE $\frac{1}{4}$ .

Sec. 12, SW $\frac{1}{4}$ SW $\frac{1}{4}$ .

Sec. 14, S $\frac{1}{2}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ .

Sec. 24, NE $\frac{1}{4}$ .

Sec. 25, lots 3 and 4, S $\frac{1}{2}$ N $\frac{1}{2}$ , S $\frac{1}{2}$ .

T. 11 N., R. 3 W.,

Sec. 8, lots 1 and 10, N $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,  
E $\frac{1}{2}$ SE $\frac{1}{4}$ .

Sec. 9, W $\frac{1}{2}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ .

Sec. 17, lot 2, SW $\frac{1}{4}$ NW $\frac{1}{4}$ .

Sec. 19, E $\frac{1}{2}$ .

Sec. 20, W $\frac{1}{2}$ , SE $\frac{1}{4}$ .

Sec. 21, W $\frac{1}{2}$ .

Sec. 29, NW $\frac{1}{4}$ .

Sec. 30, NE $\frac{1}{4}$ .

Minerals Reservation—All Federally  
owned minerals applicable to each  
individual parcel.

Upon publication of this Notice of  
Segregation in the Federal Register as  
provided in 43 CFR 2720.1-1(b), the  
mineral interests owned by the United  
States in the private lands covered by  
the application shall be segregated to  
the extent that they will not be subject  
to appropriation under the mining and  
mineral leasing laws. The segregative  
effect of the application shall terminate  
upon: issuance of a patent or deed of  
such mineral interest; upon final

rejection of the application; or two years  
from the date of publication of this  
notice, whichever occurs first.

Dated: June 15, 1992.

Henri R. Bisson,

District Manager.

[FR Doc. 92-14838 Filed 6-23-92; 8:45 am]

BILLING CODE 4310-32-M

[OR-020-02-4333-12-G2-203]

#### Motor Vehicle and Camping Restrictions on Certain Public Lands Adjacent to Mann Lake, Harney County, OR

AGENCY: Bureau of Land Management,  
DOI.

ACTION: Notice of motor vehicle and  
camping use restrictions on public lands  
adjacent to Mann Lake, Harney County,  
Oregon.

SUMMARY: Restrict motorized vehicle  
and camping uses on public lands  
adjacent to Mann Lake Recreation Site  
to enhance and protect resources.  
Motorized vehicle use will be restricted  
to maintained gravel roads and  
maintained shoreline access locations.  
Vehicle camping use is restricted to the  
two maintained shoreline access points.  
Walk-in camping is permitted along the  
north, east, and west sides of Mann  
Lake.

EFFECTIVE DATE: July 24, 1992.

ADDRESSES: Comments should be  
submitted to the Burns District Manager,  
HC 74-12533, Highway 20 West, Hines,  
Oregon 97738.

FOR FURTHER INFORMATION CONTACT:  
Glenn T. Patterson, Andrews Resource  
Area Manager, Bureau of Land  
Management, HC 74-12533 Highway 20  
West, Hines, Oregon 97738, 503-573-  
5241.

SUPPLEMENTARY INFORMATION: The  
location of Mann Lake is described as T.  
32 S., R. 35 E., the S $\frac{1}{2}$  of the NW  
quarter, the SW quarter, the E $\frac{1}{2}$  of the  
SE quarter, and the SW $\frac{1}{4}$  of the NE  
quarter of Section 7 and T. 32 S., R. 34 E.,  
the SE $\frac{1}{4}$  of the NE quarter, the E $\frac{1}{2}$  of  
the SE quarter of Section 12, T. 32 S., R.  
34 E., the NW $\frac{1}{4}$  of Sec. 13.

This restriction is established to  
protect and enhance the resource values  
at Mann Lake Recreation Site.  
Fluctuating shoreline elevations, soft  
wet conditions during portions of the  
year, and easily damaged vegetation  
around the lake require that motorized  
vehicles use maintained gravel roads to  
protect the scenic and biological values  
at Mann Lake Recreation Site.  
Motorized vehicle use will be limited to  
maintained gravel roads. Camping will

be restricted to the two shoreline access  
points, except walk-in camping will be  
permitted along the north, east, and  
west side of Mann Lake.

Mann Lake is a destination area for  
many recreationists. In coordination  
with the Oregon Department Fish and  
Wildlife and the State Marine Board, the  
lake is managed as a high quality fishing  
location. Grazing will be allowed as  
determined by the authorized officer.

Fences and cattleguards have been  
erected to effect this change. Boat  
ramps, gravel roads and rest rooms have  
been constructed to accommodate the  
visiting public. The north end of Mann  
Lake has been designated as  
"Watchable Wildlife Site" by the  
Bureau of Land Management.

The motorized vehicle and camping  
restriction will be in effect year-round.  
Exemptions to the restrictions will be  
agency personnel performing work on  
approved projects, law enforcement  
personnel in the performance of their  
duties, search and rescue personnel in  
the performance of their duties, and  
Oregon Department of Fish and Wildlife  
in the performance of their duties.  
Researchers and others may request  
exemptions from these restrictions by  
applying in writing to the District  
Manager, Burns District, Bureau of Land  
Management, for an exemption.

This closure will take effect  
immediately and will be permanent.  
Authority for this closure order is  
contained in 43 CFR 8364.1. Penalties for  
violation of this order are contained in  
43 CFR 8360.0-7.

Dated: June 8, 1992.

Steve Anderson,

Acting Andrews Resource Area Manager.

[FR Doc. 92-14720 Filed 6-23-92; 8:45 am]

BILLING CODE 4310-33-M

#### INTERNATIONAL TRADE COMMISSION

Investigation No. 337-TA-338

#### Certain Bulk Bags and Process for Making Same; Notice of Investigation

AGENCY: U.S. International Trade  
Commission.

ACTION: Institution of investigation  
pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a  
complaint was filed with the U.S.  
International Trade Commission on May  
21, 1992, under section 337 of the Tariff  
Act of 1930, as amended, 19 U.S.C. 1337,  
on behalf of Super Sack Manufacturing  
Corporation, 11510 Data Drive, Dallas,  
Texas 75218 and Better Agricultural



Goals Corporation, 11510 Data Drive, Dallas, Texas 75218. An amended complaint was filed on June 5, 1992, and supplements to the complaint were filed on June 10 and 12, 1992. The complaint, as amended and supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain bulk bags which allegedly infringe claim 20 of U.S. Letters Patent 4,194,652, and claim 8 of U.S. Letters Patent 4,143,796, and that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and permanent cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., room 112, Washington, DC 20436, telephone 202-205-1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

**FOR FURTHER INFORMATION CONTACT:** James M. Gould, Esq., Office of Unfair Import Investigation, U.S. International Trade Commission, telephone 202-205-2578.

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.12 of the Commission's interim rules of practice and procedure, 19 CFR 210.12.

#### Scope of Investigation

Having considered the complaint, the U.S. International Trade Commission, on June 18, 1992, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain bulk bags which are allegedly produced abroad by a process covered by claim 20 of U.S. Letters Patent 4,194,652 or which allegedly infringe claim 8 of U.S. Letters Patent 4,143,796, and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby

named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

Super Sack Manufacturing Corp., 11510 Data Drive, Dallas, Texas 75218.  
Better Agricultural Goals Corp., 11510 Data Drive, Dallas, Texas 75218.

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Fib-Pak, Inc., 1301 Spence Avenue, Hawkesbury, Ontario K6A 3G7, Canada.  
TwinPak, Inc., 910 Central Parkway West, Mississauga, Ontario L5C 2V5, Canada.  
Titan Megabags Industrial Corporation, Cattleya Condominium Building, Makati Manila, Metro Manila, Philippines.  
Pacific Rim Marketing Corp., 2579 Liberty Street, Beaumont, Texas 77702.  
Trimeg Holdings, Ltd., 80800 36th Street SE, Calgary, Alberta T2C 2J5, Canada.  
Sanwey Ind. De Containers, LTDA, Rod. Regis Bittencourt 1590, Cidades Interap, 66768 Taboao Da Serra, Sao Paulo, Brazil.

(c) James M. Gould, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, S.W., room 401-I, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with § 210.21 of the Commission's Interim Rules of Practice and Procedure, 19 CFR 210.21. Pursuant to §§ 201.16(d) and 210.21(a) of the Commission's Rules, 19 CFR 201.16(d) and 210.21(a), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondents, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion

order or a cease and desist order or both directed against such respondent.

By order of the Commission.

Issued: June 18, 1992.

Kenneth R. Mason,  
Secretary.

[FR Doc. 92-14835 Filed 6-23-92; 8:45 am]

BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-336]

#### Certain Single In-Line Memory Modules and Products Containing Same; Notice

Notice is hereby given that the prehearing conference in this proceeding scheduled for July 7, 1992, and the hearing scheduled to commence immediately thereafter (57 FR 24654, June 10, 1992) are cancelled.

The Secretary shall publish this notice in the *Federal Register*.

Issued: June 19, 1992.

Janet D. Saxon,

Administrative Law Judge.

[FR Doc. 92-14835 Filed 6-23-92; 8:45 am]

BILLING CODE 7020-02-M

#### INTERSTATE COMMERCE COMMISSION

[Ex Parte No. 290 (Sub No. 5) (92-3)]

#### Quarterly Rail Cost Adjustment Factor

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Approval of rail cost adjustment factor and decision.

**SUMMARY:** The Commission has approved the third quarter 1992 rail cost adjustment factor (RCAF) and cost index filed by the Association of American Railroads. The third quarter RCAF (Unadjusted) is 1.158. The third quarter RCAF (Adjusted) is 1.010, a decrease of 1.4 percent from the second quarter 1992 RCAF (Adjusted) of 1.024. Maximum third quarter 1992 RCAF rate levels may not exceed 98.6 percent of maximum second quarter 1992 RCAF rate levels.

**EFFECTIVE DATE:** July 1, 1992.

**FOR FURTHER INFORMATION CONTACT:** William T. Bono, (202) 927-5720, Robert C. Hasek, (202) 927-6239. (TDD for hearing impaired: (202) 927-5721.)

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Commission's decision. To purchase a copy of the full decision write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building,



Washington, DC 20423, or telephone (202) 289-4357/4359.

(Assistance for the hearing impaired is available through TDD services (202) 927-5721.)

This action will not significantly affect either the quality of the human environment or energy conservation.

Decided: June 18, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-14836 Filed 6-23-92; 8:45 am]

BILLING CODE 14836

[Finance Docket No. 32087]

### Norfolk and Western Railway Co.— Trackage Rights Exemption—Norfolk Southern Railway Co.; Exemption

Norfolk Southern Railway Company (NSR) has agreed to grant overhead trackage rights to Norfolk and Western Railway Company (NW) from the junction between NW and NSR at Burkeville (milepost F-86.0) to Amelia, VA (milepost F-104.5±), a distance of approximately 18.5 miles. The trackage rights operations are expected to begin on or shortly after July 1, 1992.

NW and NSR are class I railroads which are controlled through stock ownership by Norfolk Southern Corporation, a holding company.

This notice is filed under 49 CFR 1180.2(d)(3) and (7). This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.3(d)(3). The transaction will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. This transaction also qualifies under the trackage rights exemption in 49 CFR 1180.2(d)(7).

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: R. Allan Wimbish, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510-2191.

As a condition to the use of this exemption, any employees adversely affected by the trackage rights will be protected by the conditions in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), and as clarified in *Wilmington Term.*

*RR, Inc.—Pur. & Lease—CSX Transp., Inc.*, 6 I.C.C.2d 799 (1990), *aff'd sub nom. Railway Labor Executives' Assn. v. ICC*, 930 F.2d 511 (6th Cir. 1991).

Decided: June 18, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-14837 Filed 6-23-92; 8:45 am]

BILLING CODE 7035-01-M

## DEPARTMENT OF JUSTICE

### Information Collections Under Review

The Office of Management and Budget (OMB) has been sent the following collection(s) of information proposals for review under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) and the Paperwork Reduction Reauthorization Act since the last list was published. Entries are grouped into submission categories, with each entry containing the following information:

- (1) The title of the form/collection;
- (2) The agency form number, if any, and the applicable component of the Department sponsoring the collection;
- (3) How often the form must be filled out or the information is collected;
- (4) Who will be asked or required to respond, as well as a brief abstract;
- (5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond;
- (6) An estimate of the total public burden (in hours) associated with the collection; and,
- (7) An indication as to whether section 3504(h) of Public Law 96-511 applies.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the OMB reviewer, Ms. Lin Liu on (202) 395-7340 and to the Department of Justice's Clearance Officer, Mr. Don Wolfrey, on (202) 514-4115. If you anticipate commenting on a form/collection, but find that time to prepare such comments will prevent you from prompt submission, you should notify the OMB reviewer and the DOJ Clearance Officer of your intent as soon as possible. Written comments regarding the burden estimate or any other aspect of the collection may be submitted to Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, and to Mr. Don Wolfrey, DOJ Clearance Officer, SPS/

JMD/5031, Department of Justice, Washington, DC 20530.

### Extension of the Expiration Date of a Currently Approved Collection Without Any Change in the Substance or in the Method of Collection

- (1) Canadian Border Boat Landing Card.
- (2) Form I-68, Immigration and Naturalization Service.
- (3) On occasion.
- (4) Individuals or households. Form I-68 is issued to those who have applied to enter the United States from Canada in a small pleasure craft.
- (5) 7,500 annual responses at .166 hours per response.
- (6) 1,245 annual burden hours.
- (7) Not applicable under 3504(h).
- (1) Application for Temporary Protection Status.
- (2) Form I-821, Immigration and Naturalization Service.
- (3) Annually.
- (4) Individuals or households. Form I-821 is used to apply for temporary protected status, the benefits of which include employment authorization and relief from the threat of removal or deportation.
- (5) 100,000 annual responses at .5 hours per response.
- (6) 50,000 annual burden hours.
- (7) Note applicable under 3504(h).
- (1) Change of Address Card.
- (2) Form I-697, I-697A, Immigration and Naturalization Service.
- (3) On Occasion.
- (4) Individuals or households. Form I-697 and I-697A is used by the alien public to advise the Service of address changes.
- (5) 600,000 annual responses at .083 hours per response.
- (6) 49,800 annual burden hours.
- (7) Not applicable under 3504(h).
- (1) Application for Waiver of Passport and/or Visa.
- (2) Form I-193, Immigration and Naturalization Service.
- (3) On occasion.
- (4) Individuals or households. Form I-193 will be used by an alien who wishes to waive the documentary requirements for passports and/or visas due to an unforeseen emergency. This information is needed to determine whether the applicant is eligible for entry into the U.S. Under §212.1(g) and §211.(b)(3) of 8 CFR.
- (5) 25,000 annual responses at .166 hours per response.
- (6) 4,150 annual burden hours.
- (7) Not applicable under 3504(h).
- (1) Biographic Information.



(2) Form G-325, Immigration and Naturalization Service.

(3) On occasion.

(4) Individuals or households. Form G-325 is used by INS to check other agency records on applications or petitions submitted by applicants for benefits under the I&N Act. The form is also used by applicants for adjustment to permanent resident status and specific applicants for naturalization.

(5) 1,044,994 annual responses at .25 hours per response.

(6) 261,249 annual burden hours.

(7) Not applicable under 3504(h).

(1) Arrival Information.

(2) Form N-14A, Immigration and Naturalization Service.

(3) On occasion.

(4) Individuals or households. Form N-14A is used by INS to identify arrival records of aliens applying for benefits. The information is needed primarily to identify arrival information for arrivals prior to 1924.

(5) 1,000 annual responses at .25 hours per response.

(6) 250 annual burden hours.

(7) Not applicable under 3504(h).

#### New Collections

(1) Nondiscrimination on the Basis of Disability in State and Local Government Services; and Section 504 of the Rehabilitation Act of 1973, as Amended.

(2) Form ADA II, Civil Rights Division.

(3) One time response.

(4) Individuals or households. Form ADA II will be used to determine the jurisdiction of the alleged discrimination and to provide the information needed to initiate investigation of the complaint.

(5) 1,100 annual responses at .25 hours per response.

(6) 275 annual burden hours.

(7) Not applicable under 3504(h).

(1) Juveniles Taken Into Custody Reporting Program.

(2) JTIC-1A, JTIC-1B, JTIC-1C, Office of Juvenile Justice and Delinquency Prevention.

(3) Annually.

(4) State or local governments. The forms will be used to enumerate and describe annual movements of juvenile offenders through state correctional systems.

(5) 50,023 annual responses at .026 hours per response.

(6) 1,277 annual burden hours.

(7) Not applicable under 3504(h).

(1) Application to Waive Exclusion Grounds.

(2) Form I-724, Immigration and Naturalization Service.

(3) On occasion.

(4) Individuals or households. Form I-724 will be used by aliens to apply to

waive excludability from the U.S. pursuant to provisions as amended by section 601 of the Immigration Act of 1990, Public Law 101-649. This form replaces various current forms.

(5) 76,000 annual responses at .82 hours per response.

(6) 62,320 annual burden hours.

(7) Not applicable under 3504(h).

#### Revision of a Currently Approved Collection

(1) Application to Register Permanent Residence or Adjust Status.

(2) Form I-485, Immigration and Naturalization Service.

(3) On occasion.

(4) Individuals or households. Form I-485 will be used to request adjustment to permanent resident status or other granting of permanent residence to an alien already in the United States. This form replaces various current forms.

(5) 192,000 annual responses. 100,000 at 5.25 hours per response. 92,000 at 4.5 hours.

(6) 939,000 annual burden hours.

(7) Not applicable under 3504(h).

Public comment on these items is encouraged.

Dated: June 18, 1992.

Don Wolfrey,

Department Clearance Officer, Department of Justice.

[FR Doc. 92-14782 Filed 6-23-92; 8:45 am]

BILLING CODE 4410-01-M

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Emergency Unemployment Compensation; General Administration Letter for Implementing Title I of the Emergency Unemployment Compensation Act of 1991

On November 15, 1991, the President signed into law the Emergency Unemployment Compensation Act of 1991 (Public Law 102-164), which in title I created the Emergency Unemployment Compensation (EUC) program. On December 4, 1991, the President signed into law Public Law 102-182, which provided amendments to the Emergency Unemployment Compensation Act of 1991, as if such amendments were included in that Act, as of its effective date (weeks of unemployment beginning on and after November 17, 1991). On February 7, 1992, the President signed into law Public Law 102-244, further amending the Emergency Unemployment Compensation Act of 1991, effective for weeks of unemployment beginning after the date of enactment.

In its role as principal in the EUC program, the Department of Labor issued controlling guidance for the States and cooperating State agencies in the operating instructions set forth in the Attachments to GAL 4-92, dated November 27, 1991. Based on issues raised by the States and cooperating State agencies, GAL 4-92, Change 1 was issued February 10, 1992, providing changes to, and clarifications of, the operating instructions set forth in the Attachments to GAL 4-92. In order to assure knowledge to the public of these operating instructions, both of these documents were published in the **Federal Register** on February 14, 1992 (57 FR 5472).

GAL 4-92, Change 2 was issued February 13, 1992, providing changes to the operating instructions set forth in the Attachments to GAL 4-92 because of the amendments enacted February 7, 1992 (Pub. L. 102-244). GAL 4-92, Change 2 was published in the **Federal Register** on March 11, 1992 (57 FR 8683). In publishing GAL 4-92, Change 2, the preamble and contents of the document are correct, however, the **Federal Register** publication inadvertently reflected Change 3, rather than Change 2, in the printing of the actual directive title line. This minor typographical error does not change the substance or sequence of the controlling guidance issued in the form of the GALs.

GAL 4-92, Change 3 was issued June 4, 1992, which revised section III.M., Fraud and Overpayment, in Attachment A to GAL 4-92. Changes and clarifications were needed in order to assure uniform application of the provisions by the States and cooperating State agencies.

Therefore, GALs 4-92; 4-92, Change 1; 4-92, Change 2; and 4-92, Change 3 (or any subsequent or supplemental operating instructions) provide the essential operating instructions to the States, which administer the EUC program pursuant to agreements between the States and the Secretary of Labor.

Since the States and cooperating State agencies may not vary from the operating instructions in GALs 4-92; 4-92, Change 1; 4-92, Change 2; and 4-92, Change 3 (or any subsequent or supplemental operating instructions) without the prior approval of the Department of Labor, GAL 4-92, Change 3 is published below as a continuation of assuring public notification of the required procedures.



Signed at Washington, DC on June 17, 1992.

Robert T. Jones,

*Assistant Secretary of Labor.*

DIRECTIVE: General administration letter no. 4-92, change 3.

TO: All state employment security agencies.

FROM: Donald J. Kulick *Administrator for Regional Management.*

SUBJECT: Emergency Unemployment Compensation Act of 1991, as Amended. Rescissions

Expiration Date: November 30, 1992.

### 1. Purpose

To provide clarification to section III.M., Fraud and Overpayment., in Attachment A of the implementing instructions for States and State Employment Security Agencies (SESAs) for the administration of the provisions of title I of the Emergency Unemployment Compensation Act of 1991, as amended.

### 2. References

Title I of the Emergency Unemployment Compensation Act of 1991, Public Law 102-164, as amended by Public Law 102-182 and Public Law 102-244; the Federal-State Extended Unemployment Compensation Act of 1970, as amended; 20 CFR part 615; GAL 4-92; GAL 4-92, Change 1; GAL 4-92, Change 2; UIPL 9-92 and Changes; UIPLs 16-85, 10-87 and 21-90; The Trade Act of 1974, as amended (19 U.S.C. 2271 *et seq.*); 20 CFR part 617.

### 3. Background

Title I of the Emergency Unemployment Compensation Act of 1991 created the Emergency Unemployment Compensation (EUC) program. The EUC program, as established by Public Law 102-164 (and amended by P.L. 102-182), provided 13 or 20 weeks of benefits depending on the State's total unemployment rate or a combination of the State's insured unemployment rate and exhaustions. Public Law 102-244 amended the EUC Act to increase the maximum duration to 26 or 33 weeks through the week including June 13, 1992. For weeks of unemployment beginning thereafter, individuals filing new claims and certain individuals who established claims prior to the week including June 13 will revert back to the 13 or 20 week maximum. EUC is payable to individuals who have no rights to regular, extended, or additional benefits under any State or Federal law. Except where inconsistent with the operating instructions in GAL 4-92 (and changes thereto), the terms and conditions of State law which apply to claims for extended benefits and to the payment thereof shall apply to claims for EUC.

Public Law 102-164 was enacted November 15, 1991 and the EUC program became effective in all States for weeks of unemployment beginning on and after November 17, 1991. The Employment and Training Administration issued controlling guidance for the States and State agencies in the operating instructions in GAL 4-92, dated November 27, 1991; GAL 4-92, Change 1, dated February 10, 1992 and GAL 4-92, Change 2, dated February 13, 1992.

Since the enactment of Public Law 102-244, which was signed by the President on February 7, 1992, and issuance of GAL 4-92, and Changes thereto, many States and cooperating State agencies have had questions concerning the instructions and guidelines issued in section III.M., Fraud and Overpayment., in Attachment A to the GAL, which has necessitated many verbal responses and responses to questions in UIPL 9-92 and Changes thereto. Therefore, the Department in this Change 3, is providing a revised section III.M. to replace the original section III.M. in Attachment A to GAL 4-92, which includes changes to, and clarifications of, the operating instructions in order to assure uniform application of the provisions among the States.

Specifically, the Department is clarifying that States have the option to elect implementing a waiver program for non-fraud overpayments, clarifies procedures that must be followed if such election is made, and clarifies restoration of account balances when overpayments are established. In addition, the language of certain paragraphs is changed to parallel the provisions of 20 CFR part 617, the Department's regulations implementing the Trade Act of 1974, as amended. The Trade Act of 1974 and the EUC Act contain nearly identical provisions related to waivers and offsets. Since both are Federally funded programs, the Department must follow the regulations established for the Trade Act, as such establish the precedents when the statutes parallel one another. If Congress had intended differently, the EUC statute would have contained other provisions.

The operating instructions in GAL 4-92, GAL 4-92, Change 1, GAL 4-92, Change 2, and this Change 3 are issued to the States and the cooperating State agencies, and constitute the controlling guidance provided by the Department of Labor in its role as the principal in the EUC program. As agents of the United States, the States and the cooperating State agencies may not vary from the operating instructions in GAL 4-92, GAL

4-92, Change 1, GAL 4-92, Change 2, or this Change 3 (or any subsequent or supplemental operating instructions) without the prior approval of the Department of Labor.

### 4. Attachment A—Changes to Operating Instructions

#### M. Fraud and Overpayment

The Act contains specific provisions with respect to fraud and overpayments of EUC.

Provisions of the State law applied to detection and prevention of fraudulent overpayments of EUC will be, as a minimum, commensurate with those applied by the State with respect to regular compensation and which are consistent with the Secretary's "Standard for Fraud and Overpayment Detection" (Employment Security Manual, part V, sections 7510, *et seq.*)

#### 1. Fraudulent Claiming of EUC

Section 105 of the Act provides that, if an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure the individual has received an amount of EUC to which the individual was not entitled, the individual:

a. Shall be ineligible for further EUC in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation, and

b. Shall be subject to prosecution under section 1001 of title 18, U.S.C.

Provisions of State law relating to disqualification for fraudulently claiming or receiving a payment of compensation shall apply to claims for and payment of EUC.

When a SESA has sufficient facts to make a prima facie case under 18 U.S.C. 1001, it will consider referral for criminal prosecution in accordance with the provisions of the Memorandum of Understanding (MOU) between the Department's Office of Inspector General and the Employment and Training Administration, which was transmitted as an attachment to UIPL 10-87 (also see UIPLs 16-85 and 21-90). If Federal prosecution is recommended, the matter will be referred to the appropriate Regional Office of the U.S. Department of Labor, Office of the Inspector General (OIG).

For those cases not meeting the criteria of referral to the OIG for



investigation and prosecution, as outlined in the MOU, or if the OIG does not accept the case for investigation, or it is accepted, but is later returned because the U.S. Attorney declines prosecution, the SESA should refer the case for prosecution under State law provisions.

## 2. Recovery of Overpayments

Under section 105(b) of the Act each State shall require repayment from individuals who have received any payment of EUC to which they are not entitled (whether fraudulent or non-fraudulent), unless the SESA, under the optional language of section 105(b), elects to have a program under which it will waive recovery of overpayments. A SESA may elect to have an EUC waiver program even if it has not waiver provisions under State law for regular compensation. If the SESA elects to have an EUC waiver program and has a waiver program under State law, no State law waiver provisions for regular compensation apply to EUC, and the SESA shall follow the guidelines outlined in this section ILM.2.

Any SESA electing to have a waiver program may waive recovery of a non-fraudulent EUC overpayment if it determines, in accordance with the guidelines which follow, that—

a. The payment of such EUC was without fault on the part of the individual, and

b. Such repayment would be contrary to equity and good conscience.

(1) In determining whether fault exists, for purposes of section ILM.2.a. above, the following factors shall be considered:

(a) Whether a material statement or representation was made by the individual in connection with the application for EUC that resulted in the overpayment, and whether the individual knew or should have known that the statement or representation was inaccurate.

(b) Whether the individual failed or caused another to fail to disclose a material fact, in connection with an application for EUC that resulted in the overpayment, and whether the individual knew or should have known that the fact was material.

(c) Whether the individual knew or could have been expected to know that the individual was not entitled to the EUC payment.

(d) Whether, for any other reason, the overpayment resulted directly or indirectly, and partially or totally, from any act or omission of the individual or of which the individual had knowledge, and which was erroneous or inaccurate or otherwise wrong.

(e) Whether there has been a determination of fraud under section 105 of the Act (paragraph 1 of this section ILM.1).

An affirmative finding on any one of the factors in section ILM.2.b.(1) (a)–(e) above precludes waiver of overpayment recovery.

(2) In determining whether equity and good conscience exists, for purposes of section ILM.2.b. above, the following factors shall be considered:

(a) Whether the overpayment was the result of a decision on appeal, whether the State agency had given notice to the individual that the case has been appealed and that the individual may be required to repay the overpayment in the event of a reversal on appeal, and whether recovery of the overpayment will not cause extraordinary and lasting financial hardship to the individual.

(b) Whether recovery of the overpayment will not cause extraordinary financial hardship to the individual, and there has been no affirmative finding under the preceding paragraph (2)(a) with respect to such individual and such overpayment.

An affirmative finding on either of the foregoing factors, in preceding paragraphs (2)(a) and (2)(b), precludes waiver of recovery of the overpayment.

For the purpose of this paragraph (2), an extraordinary financial hardship shall exist if recovery of the overpayment would result directly in the individual's loss of or inability to obtain minimal necessities of food, medicine, and shelter for a substantial period of time; and an extraordinary and lasting financial hardship shall be extraordinary as described above and may be expected to endure for the foreseeable future.

In applying this test in the case of attempted recovery by repayment, a substantial period of time shall be 30 days, and the foreseeable future shall be at least three months. In applying this test in the case of proposed recoupment from other benefits, a substantial period of time and the foreseeable future shall be the longest potential period of benefit entitlement as seen at the time of the request for a waiver determination. In making these determinations, the State agency shall take into account all potential income of the individual and the individual's family and all cash resources available or potentially available to the individual and the individual's family in the time period being considered.

(3) Determinations granting or denying waivers or overpayments shall be made only on request for a waiver determination. Such request shall be made on a form which shall be furnished

to the individual by the State agency. Notices of determination of overpayments shall include an accurate description of the waiver provisions of this paragraph (2), if the SESA has elected to allow waivers of EUC overpayments.

(4) Unless an EUC overpayment is otherwise recovered, or is waived under paragraph (2) of this section, the SESA shall, during the three-year period after the date the individual received the payment of EUC to which the individual was not entitled, recover the overpayment by deductions from any sums payable to the individual under:

(a) The Act and this GAL 4-92 and changes;

(b) Any Federal unemployment compensation law administered by the SESA; or

(c) Any other Federal law administered by the SESA which provides for the payment of any unemployment assistance or an allowance with respect to unemployment.

(5) No single deduction under this section ILM.2., shall exceed 50 percent of the amount otherwise payable to the individual, and when a deduction is made it shall be 50 percent of the amount otherwise payable.

(6) To the extent permitted under State law, an EUC overpayment may be recovered by offset, within the 50 percent and three-year limitations provided in paragraphs (4) and (5) above, from benefits payable under the State unemployment compensation law.

(7) At the end of the three-year limitation, the SESA may remove the overpayment from its accounting record. Although no further active collection efforts by the SESA are required, the SESA shall maintain an administrative record during the subsequent three-year period to provide for possible collection through methods other than offset. After the subsequent three-year period, the SESA may dispose of the overpayment record.

(8) No repayment may be required, and no deduction may be made, under this section ILM.2. until a determination under paragraph 2. of this section by the State agency has been made, notice of the determination and an opportunity for a fair hearing thereon has been given to the individual concerned, and the determination has become final.

(9) EUC overpayment recovery shall be enforced by any action or proceeding which may be brought under State or Federal law, unless recovery of the overpayment is waived in accordance with the Act and the instructions in this section ILM.



(10) Overpayments of EUC recovered in any manner shall be deposited into the fund from which payment was made.

(11) If a State has an agreement in effect with the Secretary to implement the cross-program offset provisions of section 303(g)(2) of the SSA, EUC payments shall be used to offset State regular compensation or EB overpayments and State regular compensation or EB payments shall be used to offset EUC overpayments. Determinations under this section III.M.2., shall be subject to the determination and appeal and hearing provisions of sections III.I. and J.

(12) An individual who has an overpayment established under paragraph 2. of this section may have the amount of such overpayment restored to the EUC account established for such individual in accordance with the State law for regular compensation. No restoration is permitted nor shall such occur until the determination of overpayment is final in accordance with paragraph (8) of this section.

(13) If the SESA elects to implement an EUC waiver program, it may not put such election into effect unless it previously elected to allow waiver of nonfraudulent EUC overpayments and has published agency instructions on such election.

#### 5. Action Required

SESA Administrators shall provide the above controlling guidance to appropriate staff and assure that any changes required in the State's EUC fraud and overpayment procedures are implemented.

#### 6. Inquiries

Direct questions to the appropriate Regional Office.

[FR Doc. 92-14758 Filed 6-23-92; 8:45 am]

BILLING CODE 4510-30-M

#### Employment and Training Administration

#### Wagner-Peyser Act Final Planning Allotments for Program Year (PY) 1992

**AGENCY:** Employment and Training Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice announces the final planning allotments for Program Year (PY) 1992 (July 1, 1992, through June 30, 1993) for basic labor exchange activities provided under the Wagner-Peyser Act.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Litman, Acting Director, U.S. Employment Service, 200 Constitution Avenue, NW., room N-4470, Washington, DC 20210. Telephone: (202) 535-0157 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** In accordance with section 6(b)(5) of the Wagner-Peyser Act, the Employment and Training Administration is publishing final planning allotments for each State for Program Year (PY) 1992 (July 1, 1992, through June 30, 1993). Preliminary planning estimates provided to each State on January 30, 1992, were in error. A mistake was made by ETA during the compilation of the civilian labor force (CLF) estimates used in the statutory formula. The final planning allotments to States contained in this notice are correct and are based on civilian labor force and unemployment data for Calendar Year 1991.

The total amount of funds currently available for distribution is \$821,608,000. Funds are distributed in accordance with formula criteria established in section 6(a) and (b) of the Wagner-Peyser Act.

The Secretary of Labor set aside 3 percent of the total available funds to assure that each State will have sufficient resources to maintain statewide employment services, as

required by section 6(b)(4) of the Act. In accordance with this provision, \$24,066,542 is set aside for administrative formula allocation. These funds are included in the total planning allotment. The funds that are set aside are distributed in two steps to States which have lost in relative share of resources from the prior year. In Step 1, States which have a CLF below one million and are below the median CLF density are maintained at 100 percent of their relative share of prior year resources. The remainder is distributed in Step 2 to all other States losing in relative share from the prior year but which do not meet the size and density criteria for Step 1.

Postage costs incurred by States during the conduct of employment service (ES) activities are billed directly to the Department of Labor by the U.S. Postal Service. The total final planning allotment reflects \$19,389,950, or 2.36 percent of the total amount available, withheld from distribution to finance postage costs associated with the conduct of ES business.

Differences between preliminary planning estimates and final planning allotments are caused by the use of a Calendar Year data base as opposed to the earlier data used for preliminary planning estimates. Additionally, the use of incorrect civilian labor force data in the preliminary planning estimates cause some differences.

Ten percent of the total sums allotted to each State shall be reserved for use by the Governor to provide performance incentives for public ES offices; services for groups with special needs; and for the extra costs of exemplary models for delivering job services.

Signed at Washington, DC, this 27th day of May 1992.

Robert T. Jones,  
Assistant Secretary of Labor.

BILLING CODE 4510-30-M



U. S. DEPARTMENT OF LABOR  
EMPLOYMENT AND TRAINING ADMINISTRATION  
FINAL PY 1992 WAGNER-PEYSER ALLOTMENTS TO STATES

State	Basic Formula	3% Distribution			Total Allotment***
		Step 1*	Step 2**	Total	
Alabama	11,214,656	0	526,295	526,295	11,740,951
Alaska	7,612,415	1,108,078	0	1,108,078	8,720,493
Arizona	9,365,716	0	393,159	393,159	9,758,875
Arkansas	6,685,576	0	407,026	407,026	7,092,602
California	89,584,018	0	0	0	89,584,018
Colorado	9,308,391	0	534,758	534,758	9,843,149
Connecticut	10,454,377	0	0	0	10,454,377
Delaware	2,173,349	0	67,386	67,386	2,240,735
District of Columbia	4,570,061	0	387,025	387,025	4,957,086
Florida	38,437,581	0	0	0	38,437,581
Georgia	16,822,176	0	1,208,681	1,208,681	18,030,857
Hawaii	2,611,221	0	119,154	119,154	2,730,375
Idaho	6,342,497	923,226	0	923,226	7,265,723
Illinois	35,734,625	0	481,157	481,157	36,215,782
Indiana	15,616,589	0	418,636	418,636	16,035,225
Iowa	7,894,243	0	608,275	608,275	8,502,518
Kansas	6,663,938	0	247,829	247,829	6,911,767
Kentucky	10,431,462	0	270,907	270,907	10,702,369
Louisiana	11,768,692	0	996,656	996,656	12,765,348
Maine	3,912,975	407,882	0	407,882	4,320,857
Maryland	14,239,843	0	0	0	14,239,843
Massachusetts	20,139,586	0	0	0	20,139,586
Michigan	29,578,106	0	269,237	269,237	29,847,343
Minnesota	12,993,058	0	240,257	240,257	13,233,315
Mississippi	7,507,437	0	290,989	290,989	7,798,426
Missouri	15,504,921	0	6,013	6,013	15,510,934
Montana	5,183,121	754,465	0	754,465	5,937,586
Nebraska	6,229,093	906,718	0	906,718	7,135,811
Nevada	5,038,540	733,419	0	733,419	5,771,959
New Hampshire	3,777,040	0	0	0	3,777,040
New Jersey	23,211,240	0	0	0	23,211,240
New Mexico	5,816,373	846,643	0	846,643	6,663,016
New York	50,941,318	0	1,746,966	1,746,966	52,688,284
North Carolina	19,046,140	0	0	0	19,046,140
North Dakota	5,277,967	768,271	0	768,271	6,046,238
Ohio	31,023,792	0	642,773	642,773	31,666,565
Oklahoma	10,766,676	0	911,799	911,799	11,678,475
Oregon	8,431,824	0	347,023	347,023	8,778,847
Pennsylvania	34,735,169	0	0	0	34,735,169
Puerto Rico	9,296,325	0	208,147	208,147	9,504,472
Rhode Island	3,248,963	0	0	0	3,248,963
South Carolina	9,862,727	0	0	0	9,862,727
South Dakota	4,878,055	710,059	0	710,059	5,588,114
Tennessee	13,958,369	0	0	0	13,958,369
Texas	49,353,567	0	1,966,574	1,966,574	51,320,141
Utah	10,668,900	1,552,985	0	1,552,985	12,221,885
Vermont	2,285,161	332,632	0	332,632	2,617,793
Virginia	18,362,656	0	0	0	18,362,656
Washington	14,192,386	0	246,469	246,469	14,438,855
West Virginia	5,583,416	812,733	0	812,733	6,396,149
Wisconsin	14,075,020	0	115,341	115,341	14,190,361
Wyoming	3,784,631	550,899	0	550,899	4,335,530
FORMULA TOTAL	776,195,978	10,408,010	13,658,532	24,066,542	800,262,520
Guam	375,376	0	0	0	375,376
Virgin Islands	1,580,154	0	0	0	1,580,154
India Postage	19,389,950	0	0	0	19,389,950
NATIONAL TOTAL	797,541,458	10,408,010	13,658,532	24,066,542	821,608,000

\* Funds are allocated to the 13 States whose relative share decreased from PY 1991 to the PY 1992 basic formula amount and which have a Civilian Labor Force (CLF) below one million and are below the median CLF density. These States are held harmless at 100% of their PY 1991 relative share.

\*\* The balance of the 3% funds are distributed to the remaining 26 States losing in relative share from PY 1991 to their PY 1992 total allotment amount.

\*\*\* Hold harmless provisions required under Section 6(B) of the Wagner-Peyser Act, as amended, are maintained at the revised allotment level.

[FR Doc. 92-14810 Filed 6-23-92; 8:45 am]

BILLING CODE 4510-30-C



**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[Notice 92-42]

**NASA Wage Committee Renewal****AGENCY:** National Aeronautics and Space Administration (NASA).**ACTION:** Notice of renewal.

**SUMMARY:** Pursuant to section 9(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), and after consultation with the Committee Management Secretariat, General Services Administration, NASA has determined that the renewal of the NASA Wage Committee is in the public interest in connection with the performance of duties imposed upon NASA by law.

**FOR FURTHER INFORMATION CONTACT:** Deborah Green Glasco, NASA, Code FPP, Washington, DC 20546, (202) 453-3781.

**SUPPLEMENTARY INFORMATION:** The function of this Committee is to provide recommendations to NASA relating to a survey of wages and the establishment of wage schedules for trades and labor employees in the Cleveland, Ohio, wage area. NASA has been designated the "lead Agency" for that area under Federal Personnel Manual Supplement 532-1.

Dated: June 18, 1992.

John W. Gaff,

*Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.*

[FR Doc. 92-14842 Filed 6-23-92; 8:45 am]

BILLING CODE 7510-01-M

[Notice 92-41]

**NASA Advisory Council (NAC), Space Station Advisory Committee (SSAC); Meeting****AGENCY:** National Aeronautics and Space Administration.**ACTION:** Notice of meeting change.**FEDERAL REGISTER CITATION OF**

**PREVIOUS ANNOUNCEMENT:** 57 FR 20856, Notice Number 92-30, May 15, 1992.

**PREVIOUSLY ANNOUNCED TIMES AND**

**DATES OF MEETING:** May 27, 1992, 8:30 a.m. to 5 p.m. and May 29, 1992, 8:30 a.m. to noon.

**CHANGES IN THE MEETING:** Dates changed to July 28, 8:30 a.m. to 5 p.m., and July 30, 8:30 a.m. to noon.

**CONTACT PERSON FOR MORE**

**INFORMATION:** Dr. William P. Raney, Office of Space Systems Development, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-4165.

Dated: June 18, 1992.

John W. Gaff,

*Advisory Committee Management Officer.*

[FR Doc. 92-14841 Filed 6-23-92; 8:45 am]

BILLING CODE 7510-01-M

**NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES****National Endowment for the Arts****Cooperative Agreement for Assessments of the Readiness of Advancement Applicants****AGENCY:** National Endowment for the Arts, NFAH.**ACTION:** Notification of availability.

**SUMMARY:** The National Endowment for the Arts is requesting proposals leading to the award of a Cooperative Agreements for the design and implementation of a process for conducting independent assessments of the readiness of approximately 125 arts organizations which have applied to the Endowment to participate in the Advancement Program. The recipient of the Cooperative Agreement through one-day, on site or telephone interviews with key staff and board members, and an analysis of application materials, will prepare written reports which will provide professional judgement on each organization's financial and organizational status and capacity to develop through the period of technical assistance services provided by the program. The recipient will also identify principal areas of need in order to assist in the selection of appropriate consultants and to permit planning for supplementary workshops or specialized assistance. Those interested in receiving the Solicitation package should reference Program Solicitation PS 92-08 in their written request and include two (2) self-addressed labels. Verbal requests for the Solicitation will not be honored.

**DATES:** Program Solicitation PS 92-08 will be available approximately July 13, 1992 with proposals due August 13, 1992.

**ADDRESSES:** Requests for the Solicitation should be addressed to National Endowment for the Arts, Contracts Division, room 217, 1100 Pennsylvania Ave., NW Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** William Hummel or Anna Mott, Contracts Division, National Endowment for the Arts, 1100

Pennsylvania Ave., NW Washington, DC 20506 (202/682-5482).

William I. Hummel,

*Director, Contracts and Procurement  
Division.*

[FR Doc. 92-14774 Filed 6-23-92; 8:45 am]

BILLING CODE 7537-01-M

**National Endowment for the Humanities****Meetings****AGENCY:** National Endowment for the Humanities, NFAH.**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** David C. Fisher, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone 202/786-0322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on 202/786-0282.

**SUPPLEMENTARY INFORMATION:** The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; or (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated September 9, 1991, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of title 5, United States Code.

1. Date: July 9-10, 1992.

Time: 8:30 a.m. to 5 p.m.

Room: 415.



**Program:** This meeting will review applications submitted to the Humanities Projects in Museums and Historical Organizations for the June 5, 1992 deadline, submitted to the Division of Public Programs, for projects beginning after January 1, 1993.

2. **Date:** July 10, 1992.

**Time:** 9 a.m. to 5 p.m.

**Room:** 430.

**Program:** This meeting will review applications submitted to the Division of Public Programs in the Challenge Grants category, submitted to the Division of Public Programs, for projects beginning after December 1, 1991.

3. **Date:** July 14, 1992.

**Time:** 9 a.m. to 5 p.m.

**Room:** 315.

**Program:** This meeting will review Challenge Grant applications submitted to the Division of Research Programs, for projects beginning after December 1, 1991.

4. **Date:** July 16-17, 1992.

**Time:** 8:30 a.m. to 5 p.m.

**Room:** 415.

**Program:** This meeting will review applications submitted to the Humanities Projects in Museums and Historical Organizations programs for the June 5, 1992 deadline, submitted to the Division of Public Programs, for projects beginning after January 1, 1993.

5. **Date:** July 20, 1992.

**Time:** 9 a.m. to 5:30 p.m.

**Room:** 315.

**Program:** This meeting will review proposals submitted to the May 1, 1992 deadline in the Challenge Grants Program, submitted to the Division of Education Programs, for projects beginning after December 1992.

6. **Date:** July 21, 1992.

**Time:** 9 a.m. to 5 p.m.

**Room:** 315.

**Program:** This meeting will review Challenge Grant applications submitted to the Division of Research Programs, for projects beginning after December 1, 1991.

7. **Date:** July 24, 1992.

**Time:** 9 a.m. to 5:30 p.m.

**Room:** 315.

**Program:** This meeting will review proposals submitted to the May 1, 1992 deadline in the Challenge Grants Program, submitted to the Division of Education Programs, for projects beginning after December, 1992.

8. **Date:** July 23-24, 1992.

**Time:** 8:30 a.m. to 5 p.m.

**Room:** 415.

**Program:** This meeting will review applications submitted to the Humanities Projects in Museums and Historical Organizations program, for the June 5, 1992 deadline, submitted to

the Division of Public Programs, for projects beginning after January 1, 1993.

9. **Date:** July 30-31, 1992.

**Time:** 8:30 a.m. to 5 p.m.

**Room:** 415.

**Program:** The meeting will review applications submitted to the Humanities Projects in Museums and Historical Organizations program, for the June 5, 1992 deadline, submitted to the Division of Public Programs, for projects beginning after January 1, 1993.

David C. Fisher,

*Advisory Committee, Management Officer.*

[FR Doc. 92-14781 Filed 6-23-92; 8:45 am]

BILLING CODE 7536-01-M

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Subcommittee on Planning and Procedures; Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on July 8, 1992, room P-422, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance, with the exception of a portion that will be closed to discuss the qualifications of candidates nominated for appointment to the ACRS. This session will be closed to discuss information the release of which would represent a clearly unwarranted invasion of personal privacy per 5 U.S.C. 552b(c)(6).

The agenda for the subject meeting shall be as follows:

#### Wednesday, July 8, 1992—1 p.m. Until 4 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. Qualifications of candidates nominated for appointment to the ACRS will also be discussed.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on

requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff engineer, Mr. Raymond F. Fraley (telephone 301/492-4516) between 7:30 a.m. and 4:15 p.m. e.s.t. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated: June 17, 1992.

Sam Duraiswamy,

*Chief Nuclear Reactors Branch.*

[FR Doc. 92-14831 Filed 6-23-92; 8:45 am]

BILLING CODE 7590-01-M

### Advisory Committee on Reactor Safeguards; Joint Meeting of the Subcommittees on Plant License Renewal and Materials and Metallurgy

The ACRS Subcommittees on Plant License Renewal and Materials and Metallurgy will hold a joint meeting on July 7, 1992, room P-110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

#### Wednesday, July 7, 1992—8:30 a.m. Until the Conclusion of Business

The Subcommittee will discuss the proposed Standard Review Plan for License Renewal, the proposed Regulatory Guide on the Form and Content of a License Renewal Application, and the proposed Branch Technical Position on Reactor Component Fatigue Considerations for License Renewal.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairmen; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those sessions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittees, their consultants, and staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the meeting, the Subcommittees, along with any of their consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittees will then hear presentations by and hold discussions



with representatives of the NRC staff, the nuclear industry, their respective consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff engineer, Mr. Elpidio Igne (telephone 301/492-8192) between 7:30 a.m. and 4:15 p.m. (e.s.t.). Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated: June 17, 1992.

Sam Duraiswamy,

Chief Nuclear Reactors Branch.

[FR Doc. 92-14832 Filed 6-23-92; 8:45 am]

BILLING CODE 7590-01-M

#### **Advisory Committee on Reactor Safeguards; Subcommittee on Auxiliary and Secondary Systems; Meeting**

The ACRS Subcommittee on Auxiliary and Secondary Systems will hold a meeting on July 8, 1992, room P-110, 7920 Norfolk Avenue, Bethesda, MD.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

**Wednesday, July 8, 1992—8:30 a.m. Until 12 Noon**

The Subcommittee will discuss the proposed resolution of Generic Issue 106, "Piping and Use of Highly Combustible Gases in Vital Areas."

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the Committee. Recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Subcommittee, its consultants, and staff. Persons desiring to make oral statements should notify the ACRS staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be

considered during the balance of the meeting.

The Subcommittee will then hear presentation by and hold discussions with representatives of the NRC staff, its consultants, and other interested persons regarding this review.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the cognizant ACRS staff engineer, Mr. Herman Alderman, (telephone 301/492-7750) between 7:30 a.m. and 4:15 p.m. (e.s.t.). Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated: June 17, 1992.

Sam Duraiswamy,

Chief, Nuclear Reactors Branch.

[FR Doc. 92-14833 Filed 6-23-92; 8:45 am]

BILLING CODE 7590-01-M

#### **Biweekly Notice Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations**

##### **I. Background**

Pursuant to Public Law (P.L.) 97-415, the Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. P.L. 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from May 30, 1992 through June 12, 1992. The last biweekly notice was published on June 10, 1992 (57 FR 24662).

#### **Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing**

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Rules and Directives Review Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to Room P-223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By July 24, 1992 the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should



consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room for the particular facility involved. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the

petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the *Federal Register* a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S.

Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to (Project Director): petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this *Federal Register* notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document room for the particular facility involved.

**Carolina Power & Light Company,  
Docket No. 50-261, H. B. Robinson  
Steam Electric Plant, Unit No. 2,  
Darlington County, South Carolina**

*Date of amendment request:* June 5, 1992

*Description of amendment request:* The amendment would revise the wording of the footnote associated with the refueling interval calibration of the containment vessel (CV) high-range radiation monitors. The revised wording would reflect the acceptability of the approved alternate calibration methodology while providing the flexibility to calibrate these monitors utilizing the methodology provided in NUREG-0737.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the



issue of no significant hazards consideration, which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated because the proposed amendment only involves the methodology used for calibration of the CV High-Range Radiation Monitors and, therefore, has no effect on the probability of any previously evaluated accidents. The calibration method provided

by the 1982 correspondence [letter from the licensee to NRC dated April 28, 1982] has been previously evaluated as an acceptable deviation from the NUREG-0737 calibration method. The proposed amendment would clearly identify this method as an alternative to the NUREG-0737 method, and would facilitate calibration using the preferred, NRC-approved methodology. The intent of this calibration requirement is to ensure the availability of properly functioning accident radiation monitors during the unlikely event of an accident involving a significant release of radioactivity to the containment atmosphere. Since either calibration method is acceptable for ensuring the operability of these monitors, the

proposed amendment does not increase the consequences of an accident previously evaluated.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated because the proposed amendment only involves a change to the CV High-Range Radiation Monitor calibration method. This calibration will continue to be performed on a refueling interval basis, and typically the unit is in cold shutdown during this calibration. The proposed amendment will not physically change any equipment or mode of operation, and will provide the calibration using either of two NRC-approved methods. The proposed change merely identifies an alternative to the NUREG-0737 method, and would facilitate calibration using either of two, NRC-approved methods, and therefore the proposed change cannot create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety because the proposed amendment only involves a change to the CV High-Range Radiation Monitor calibration method. This calibration will continue to be performed on a refueling interval basis, and typically the unit is in cold shutdown during this calibration. The proposed amendment will not physically change any equipment or mode of operation, and will provide the calibration using either of two NRC-approved methods. The proposed change only facilitates an alternative to the preferred calibration method; either method is acceptable for ensuring the operability of these monitors and the availability of post-accident radiation monitoring for the Containment.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three

standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Local Public Document Room location:* Hartsville Memorial Library, Home and Fifth Avenues, Hartsville, South Carolina 29535.

*Attorney for licensee:* R. E. Jones, General Counsel, Carolina Power & Light Company, P. O. Box 1551, Raleigh, North Carolina 27602

*NRC Project Director:* Elinor G. Adensam

**Carolina Power & Light Company, et al., Docket No. 50-400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina**

*Date of amendment request:* April 2, 1992

*Description of amendment request:*

The amendment would revise Instrumentation Specifications 3.3.2, 3.3.3.1 and 3.3.3.6 of the Technical Specifications (TS) to include editorial corrections and rewordings that would clarify or simplify the requirements. Specifically, the proposed revisions are:

#### TS 3.3.2

The revision to TS 3.3.2 would revise the outline notation for Table 3.3-3 from 3.c.4.c) to 3.c.4.c.

#### TS 3.3.3.1

The action requirements of TS 3.3.3.1 listed in Table 3.3-6 would be revised to be consistent with associated TS 3.9.12.

#### TABLE 3.3-6

1. Items 2a and 2b, Channels to Trip and Minimum Channels Operable, column entries would be revised to reflect the number of channels required operable per safety train.

2. Action Statement 28 would be revised so if a required train of radiation monitors is inoperable, then the associated train of the Fuel Handling Building (FHB) Emergency Exhaust System would be declared inoperable and the Action Statements of TS 3.9.12 would apply.

3. Action Statement 30 would be revised to capitalize "Minimum Channel" so that it is consistent with the other Action Statements in this Table.

#### TS 3.3.3.6

The following changes to TS 3.3.3.6 and the associated Tables 3.3-10 and 4.3-7 are proposed:

1. Delete the exceptions in Action Statement a. and insert "N.A." in the Total Required Number of Channels column of Table 3.3-10.

2. Remove the "or" at the end of Action Statements a. and b. so these Action Statements are consistent with the standard Action Statement format in the rest of the TS.

3. Revise Action Statement c. to reword the reference to Table 3.3-10, delete an unnecessary comma, and add a parenthesis around the "s" in channels to change it to channel(s) so the format is consistent with Action Statements a. and b.

4. Delete repetitive and potentially misleading identical listings in Table 3.3-10, Items 7, 8, 10, 12 and 13, where the Total Required Number of Channels and Minimum Channels Required are identical.

5. Revise the instrument descriptions for Items 18, 23, and 24 in Table 3.3-10 and Surveillance Requirements Table 4.3-7 so they are consistent with other references to these instruments elsewhere in the TS.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

With the exception of the changes to Action Statement 28 to Specification 3.3.3.1, the proposed changes affect only the format of the information and/or requirements presented in the designated Technical Specifications and therefore have no impact on the probability or consequences of an accident previously evaluated. No safety-related equipment, safety function or plant operation will be altered as a result of these proposed changes. The revisions do not change the function, materials, or construction standards applicable to the AFW pumps.

The Revision to Action Statement 28 does, by itself, effectively relax the restrictions on spent fuel handling activities if two radiation monitoring channels are not available. However, this has no impact on any accident initiating factors, and therefore, does not significantly increase the probability of an accident previously evaluated. Additionally, it does not significantly increase the consequences of an accident previously evaluated because, when viewed in conjunction with its reference to the Action Requirements of Specification 3.9.12, it is bounded by the Technical Specification 3.9.12 limitations governing operation of the Fuel Handling Building Emergency Exhaust System. The Radiation monitoring System's automatic initiation function of starting the Emergency Exhaust System is effectively satisfied by including direct reference to the Action Statement Requirements of Specification 3.9.12, which require that the operable train of the Emergency Exhaust System be running.

Therefore, there would be no increase in the probability or consequences of an accident previously evaluated.



2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

With the exception of the changes to Action Statement 28 to Specification 3.3.3.1, the proposed changes affect only the format of the information and/or requirements presented in the designated Technical Specifications. The revision to Action Statement 28 has no impact on any accident initiating factors.

No safety-related equipment, safety function or plant operations will be altered as a result of this proposed change. The changes do not affect the function, materials, or construction standards applicable to plant systems, nor do the changes reduce the availability of accident mitigation systems.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

Those changes which revise only the format of information presented within the affected Technical Specifications do not impact the margin of safety as defined in the BASES for any of the affected Technical Specifications.

In addition, the revision to Technical Specification 3.3.3.1 Action Statement 28 has no net effect on the margin of safety as defined in the BASES for Specification 3.3.3.1. Although the revised Action Statement would allow operation with only one Fuel Pool operating floor area radiation monitor channel in service, it also requires that the associated operable FHB Emergency Filtration System train be operating. This obviates the need for the Radiation Monitoring Systems to automatically initiate operation of the Emergency Filtration System if a high radiation level alarm were to be generated while only one monitor train was operable.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Cameron Village Regional Library, 1930 Clark Avenue, Raleigh, North Carolina 27605.

**Attorney for licensee:** R. E. Jones, General Counsel, Carolina Power & Light Company, P. O. Box 1551, Raleigh, North Carolina 27602

**NRC Project Director:** Elinor G. Adensam

**Connecticut Yankee Atomic Power Company, Docket No. 50-213, Haddam Neck Plant, Middlesex County, Connecticut**

**Date of amendment request:** May 7, 1992

**Description of amendment request:** The proposed change to Technical Specification (TS) 4.4.6.2.1.g would correct the specification referenced in the note on the bottom of page 3/4 4-32a from TS 4.0.5 to TS 4.4.6.2.1.i. The associated Bases section will also be clarified. In addition, Bases page B 3/4 4-12 will also be reissued.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The proposed changes do not involve a significant hazards consideration because the changes would not:

1. Involve a significant increase in the probability or consequences of an accident previously analyzed.

The proposed change to Technical Specification 4.4.6.2.1.g the footnote to state that the piping will be tested in accordance with Technical Specification 4.4.6.2.1.i (versus 4.0.5). This change is an editorial change to correct an error of omission which occurred when Technical Specification 4.4.6.2.1.i was introduced into the technical specifications as a means of assuring that high-pressure safety injection, charging, and residual heat removal pump suction piping was adequately leak-tested. As such, this change has no safety significance.

2. Create the possibility of a new or different kind of accident from any previously evaluated.

Since there are no changes in the way the plant is operated, the potential for an unanalyzed accident is not created. No new failure modes are introduced.

3. Involve a significant reduction in a margin of safety.

The proposed changes do not have any adverse impact on the protective boundaries. Since the proposed changes do not also affect the consequences of any accident previously analyzed, there is no reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Russell Library, 123 Broad Street, Middletown, Connecticut 06457.

**Attorney for licensee:** Gerald Garfield, Esquire, Day, Berry & Howard, Counselors at Law, City Place, Hartford, Connecticut 06103-3499.

**NRC Project Director:** John F. Stolz

**Detroit Edison Company, Docket No. 50-341, Fermi-2, Monroe County, Michigan**

**Date of amendment request:** September 24, 1991 as amended April 30, 1992

**Description of amendment request:** On September 24, 1991, the licensee submitted an application to amend the Fermi-2 operating license to allow for uprated power operation. This application was previously noticed in the Federal Register on March 18, 1992 (57 FR 9442). The licensed power level would be increased approximately 4.2% from 3293 MWt to 3430 MWt. The licensee has amended their original submittal to include two additional proposed changes to the Technical Specifications (TS). The first is to provide a corrected trip set point and allowable value for the "Main Steam Line Flow-High Primary Containment Isolation Actuation Instrumentation" (Table 3.3.2-2, item 1.C.3). The second is to add the Reactor Core Isolation Cooling System warm-up bypass valve (E51-F095) to the table of motor operated valves (MOVs) contained in Table 3.8.4.3-1, "Motor-Operated Valves Thermal Overload Protection."

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The proposed change to modify the main steamline flow primary containment isolation actuation setpoint and eliminate the dual specification of the setpoint in terms of percent rated flow does not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated.

The main steamline flow setpoints are changed to reflect the redefinition of rated main steamline flow that accompanies uprated power operation. These limits continue to ensure that an adequate trip avoidance margin is maintained for the normal plant testing of MSIVs and turbine control/stop valves. The setpoints were selected to provide assurance that isolation protection will still be provided for a main steamline break accident. These setpoints have no effect on the probability of the occurrences of a main steamline break. Also, since a high level of assurance of break isolation is maintained, these setpoint changes do not significantly increase the consequences of the main steamline break accident.

The specification of the main steamline flow isolation actuation instrumentation setpoints in terms of percent rated flow is eliminated. The instrumentation is set in accordance with the differential pressure values. The percent rated flow values are informational and the elimination has no effect on the safety analysis. Thus, the



change does not significantly affect the probability or consequences of an accident.

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated.

The change modifies the main steamline flow primary containment isolation actuation instrumentation to reflect uprated power conditions and to eliminate a dual specification of the setpoint. No new design or operating modes are involved. Therefore, the change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) Involve a significant reduction in a margin of safety.

The change modifies the instrument setpoint to be consistent with uprated power conditions which has been previously evaluated in Reference 2 [September 24, 1991 submittal] and determined to not involve a significant reduction in safety. The elimination of the dual specification of the setpoint is administrative and thus does not affect safety margins.

The proposed change to include the Reactor Core Isolation Cooling (RCIC) warmup bypass valve in TS Table 3.8.4.3-1, Motor-Operated Valve Thermal Overload Protection does not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated.

The inclusion of the RCIC warmup bypass valve in the table for thermal overload protection requirements assures that the thermal overload protection does not impact the valve's function. Since the change acts to increase the RCIC system's reliability it does not result in a significant increase in the probability or consequences of a previously evaluated accident.

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed modification implements the General Electric Service Information Letter 377 which recommends a one-inch steam inlet bypass valve which reduces the RCIC turbine tendency to overspeed before adequate governor control valve hydraulic oil pressure is achieved from the turbine driven oil pump. This modification will be designed to the same quality standards as the RCIC system.

Line breaks for piping within the RCIC room have been evaluated with satisfactory results and the new MOV meets the same ASME Class II code integrity requirements of the original valve. Other evaluated concerns for electrical design, seismic criteria, operability, and environmental qualification for this modification are in compliance with the system design bases. Based on this compliance and design, there is no creation of a new failure mode or violation of existing failure mode design criteria. The equipment added/modified under this design change does not introduce a failure mechanism that has not been previously evaluated. This will ensure that the possibility of an accident of a new or different type than previously evaluated is not created.

(3) Involve a significant reduction in a margin of safety.

The proposed change ensures that the function of the new RCIC warmup bypass

MOV is not impacted by an inoperable thermal overload protection device. The new valve functions to reduce the peak RCIC turbine speed on startup thus maintaining the margin to the overspeed trip setpoint under uprated power conditions. Therefore, the change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Local Public Document Room location:* Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161

*Attorney for licensee:* John Flynn, Esq., Detroit Edison Company, 2000 Second Avenue, Detroit, Michigan 48226  
*NRC Project Director:* L. B. Marsh

**Duke Power Company, Docket Nos. 50-269, 50-270 and 50-287, Oconee Nuclear Station, Units 1, 2 and 3, Oconee County, South Carolina**

*Date of amendment request:* May 20, 1992

*Description of amendment request:* The proposed amendments to Technical Specification (TS) 3.7.2.(e) would allow a one-time extension of the outage time for each 125 VDC battery and associated distribution center servicing the 230 KV switchyard. The extension would allow battery replacement without shutdown of the three Oconee nuclear units. Current Technical Specifications allow a complete single string or single component of the 125vdc 230kv Switching Station Power System to be inoperable for up to 24 hours, and 72 hours if the inoperability is for an equalizer charge following a battery service test or performance test. The existing 59 cell 230 kv switchyard batteries are approaching the end of their recommended service life. Replacement of the existing batteries with 60 cell batteries, performance of an equalizer charge of the new batteries following installation, and other related modifications will require approximately seven days per battery, thus the licensee has proposed an extension of the allowed outage time to seven days. Compensatory measures would be implemented during the time the switchyard is out of service.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

.... operation of the facility in accordance with the proposed amendment would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated

Each accident analysis addressed within the Oconee Final Safety Analysis Report (FSAR) has been examined with respect to the change proposed within this amendment request. Analysis have shown that the probability of any Design Basis Accident (DBA) is not affected by this change, since adequate administrative measures will be in place to prevent loss of the switchyard during implementation of this modification. The reliability of emergency power is not significantly affected by a one time extension of allowable outage time for one train of the 230kv switchyard DC system. The remaining train is adequate to assure operability of the Keowee overhead path, while the Keowee underground path will be maintained operable during the battery outage. Further, the new batteries are expected to be more reliable than the existing batteries which are approaching their end of life.

(2) Create the possibility of a new or different kind of accident from any kind of accident previously evaluated

Operation of ONS, in accordance with these Technical Specifications, will not create any failure modes not bounded by previously evaluated accidents. Consequently, this change will not create the possibility of a new or different kind of accident from any kind of accident previously evaluated.

(3) Involve a significant reduction in a margin of safety

The design basis of auxiliary electrical systems is to supply the required ES loads of one unit and safe shutdown loads of the other two units. Administrative measures will be in place to prevent loss of the switchyard during implementation of this modification. The reliability of emergency power is not significantly affected by a one time extension of allowable outage time for one train of the 230kv switchyard DC system. The remaining train is adequate to assure operability of the Keowee overhead path, while the Keowee underground path will be maintained operable during the battery outage. Therefore, there will be no significant reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Local Public Document Room location:* Oconee County Library, 501 West South Broad Street, Walhalla, South Carolina 29691

*Attorney for licensee:* J. Michael McGarry, III, Winston and Strawn, 1200 17th Street, NW., Washington, DC 20036

*NRC Project Director:* David B. Matthews



Entergy Operations Inc., Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

*Date of amendment request:* April 24, 1992

*Description of amendment request:* The proposal amendment would revise the Technical Specification to increase the time for closure of the main steam isolation valves. By increasing the time for closure, the stresses on the valves is reduced and should improve the performance and reliability of the valves.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will the operation of the facility in accordance with these proposed changes involve a significant increase in the probability or consequence of any accident previously evaluated?

The limiting mass and energy released into containment for the longer MSIV closure time has been reanalyzed. Other previously analyzed accidents that are affected by this change have been reviewed. This change has no impact on probability of occurrence of these accidents. The consequences of this change are either bounded by current plant safety analyses or have a negligible impact. Therefore, this change does not increase the probability or consequence of any accident previously evaluated.

2. Will the operation of the facility in accordance with these proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

The MSIVs close automatically upon main steam isolation signal. The proposed change increases the closure time from three to four seconds. This change will not alter the function or operability of the MSIV. However, it may increase the reliability of the MSIV. Based on above discussion, this change does not create the possibility of a new or different kind of accident previously evaluated.

3. Will the operation of the facility in accordance with these proposed changes involve a significant reduction in the margin of safety?

Revised analyses for the events with greatest potential impact due to this change, show a decrease in mass and energy release into the containment from a MSIB. This would result in lower peak containment pressure and temperature values than currently presented in the FSAR. Thus the margin of safety would increase for these analyses. No other accident analyses or margins of safety are affected by this change.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the

amendment request involves no significant hazards consideration.

*Local Public Document Room location:* University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122

*Attorney for licensee:* N.S. Reynolds, Esq., Winston & Strawn 1400 L Street N.W., Washington, D.C. 20005-3502

*NRC Project Director:* John T. Larkins

Entergy Operations Inc., Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

*Date of amendment request:* April 24, 1992

*Description of amendment request:* The proposed amendment would revise the Technical Specifications (TS) to remove the requirements to conduct wall-cracking surveillance as part of the basemat cracking program. This is consistent with the NRC's Safety and Technical Evaluation Reports and letter dated October 27, 1987, and the licensee follow-up letter dated January 28, 1990.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

The Confirmatory Analysis demonstrated that the wall cracks were insignificant and that no correlation was found between the wall cracks and the basemat cracks. Based on the above no design basis accidents are affected. Therefore, the proposed change will not involve a significant increase in the probability of consequences of any accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Cracks in the basemat wall have been determined insignificant. The proposed change will not modify or change the plant in any way nor will it alter the operation or the manner in which the plant is operated. Therefore, the proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

Eliminating the wall crack surveillance is justified by the current program requirements. This, no adverse impact on the protective boundaries, safety limits or margin to safety exists. Therefore, the proposed change will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Local Public Document Room location:* University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122

*Attorney for licensee:* N.S. Reynolds, Esq., Winston & Strawn 1400 L Street N.W., Washington, D.C. 20005-3502

*NRC Project Director:* John T. Larkins

Entergy Operations Inc., Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

*Date of amendment request:* May 11, 1992

*Description of amendment request:* The proposed amendment would revise the Technical Specifications for Engineered Safety Features Actuation Instrumentation and A.C. Sources-Operating to adjust the degraded voltage protection relay setpoints. This change is proposed as a result of an issue raised during the Electrical Distribution System Functional Inspection.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

The degraded voltage relay is used to assess whether adequate voltage is available to operate electrical class 1E equipment. If sufficient voltage is not available within a specified period of time the Class 1E and non-Class 1E buses will be separated which will result in the emergency diesel generator starting and loading.

The proposed technical specification change will increase the voltage and timer setpoints of the degraded voltage relay to adequately protect all Class 1E electrical equipment at the 4.16 KV, 480V and 120V level.

Occurrence of a degraded voltage is not part of any limiting accident previously evaluated. Therefore, this change which modifies degraded voltage relay setpoints cannot change the consequences of any limiting accident.

A review of anticipated operational occurrences (AOO, moderate frequency and infrequent incidents) documented in Chapter 15 of the FSAR indicates that none of these incidents are affected by the degraded voltage relay delay time. Therefore,



occurrence of a degraded voltage condition simultaneously with an AOO or during the course of an AOO will have no significant impact on sequence of consequences of these events.

Replacement of the existing General Electric electromechanical NGV degraded voltage relays with the more accurate ABB Brown Boveri 27N Electronic relays will increase the reliability and will not affect any accidents previously evaluated. The replacement relays are Class 1E and will be able to withstand a seismic event as defined in the Final Safety Analysis Report (FSAR).

Power Distribution Panel (PDP) transformer tap setting will be changed to increase (improve) voltage of the 120V Class 1E voltage system during a degraded voltage condition. This increase in voltage will allow Class 1E equipment supplied from these PDPs to operate within their specified voltage range. Changing these transformer taps will optimize voltage levels and will have no impact on accidents previously evaluated.

Class 1E starter and auxiliary device (i.e. relays, solenoids, etc.) control circuits will be modified (i.e. parallel conductors/replace control transformer) to improve the voltage at the 1E device to allow pickup during a degraded voltage condition. Changing these control circuits will have no impact on accidents previously evaluated.

Balancing the load on the power distribution panel 360-SA to provide uniform voltage at the 120V system will have no impact on accidents previously evaluated.

Lastly, modification to the CEDM (control element drive mechanism) fan and heater drain pump control circuits will have no impact on postulated accidents, since this equipment is nonsafety.

The above proposed changes will have no negative impact on the reliability or performance of Class 1E equipment protected by the degraded voltage relays. Therefore, the proposed change will not involve a significant increase in the probability or consequences or [sic] any accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed technical specification changes and the modifications noted above in Item #1 to support the proposed change are designed to improve the present protection of Class 1E electrical equipment during a degraded voltage condition. Improvement of the present protection scheme does not involve a change in the design of the degraded voltage function. The degraded voltage protection scheme will continue to use a 3 out of 3 logic to separate the Class 1E from the non-Class 1E electrical distribution system and to start and load the emergency diesel generator. Because the proposed amendment will not change the design, function or method of operation of Class 1E equipment at Waterford 3, it will not create the possibility of a new or different kind of accident from any previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

The proposed technical specification changes and the modifications noted above in Item #1 are designated to improve the present protection of Class 1E electrical equipment during a degraded voltage condition. These changes will have no adverse impact on protective boundaries or safety limits. Therefore, the proposed change will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Local Public Document Room location:* University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122

*Attorney for licensee:* N.S. Reynolds, Esq., Winston & Strawn 1400 L Street N.W., Washington, D.C. 20005-3502

*NRC Project Director:* John T. Larkins

**Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50-424 and 50-425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia**

*Date of amendment request:* April 28, 1992

*Description of amendment request:* The existing surveillance requirement of Technical Specification (TS) 4.3.4.2.d requires that at least one of each of the four high-pressure turbine stop valves, four high-pressure turbine control valves, six low-pressure turbine intermediate stop valves, and six low-pressure turbine intercept valves be disassembled and inspected at least once per 40 months. The proposed amendments would change this requirement so that all of these valves are disassembled and inspected at least once per 60 months.

*Basis for proposed no significant hazards consideration determination:* The Vogtle facility uses General Electric turbine-generators. Steam from each of four steam generators enters the high-pressure turbine through four 28-inch stop valves and governing control valves; one stop valve and one control valve form a single assembly. After expanding through the high-pressure turbine, the steam is reheated and flows through the 34-inch combined intermediate stop and intercept valves in each of the six steam lines leading to the inlets of the three low-pressure turbines. Like the main stop and control valves, the intermediate stop and intercept valves form six single assemblies.

Under the existing TS surveillance requirement, for an 18-month fuel cycle, one of each of the stop valves, control valves, and the intermediate stop and intercept valves are disassembled and inspected during every other refueling outage. Under the proposed amendments, the licensee would disassemble and inspect all four stop valves during one outage, the four control valves during the next outage, and the intermediate stop and intercept valves during the next outage. Therefore, under the proposed change, all of the subject valves would be disassembled and inspected at least once per 60 months.

Under the existing surveillance requirement, all of the subject valves will have been inspected after about 12 fuel cycles. Under the proposed requirement, all of the valves would be inspected every three fuel cycles. Thus, each valve would be inspected more frequently under the proposed change. The licensee also notes that it is advantageous to inspect all of the valves of a given type during one outage from the standpoint of training maintenance personnel, obtaining spare parts and supplies, and because a problem generic to a given type of valve can be corrected at one time. The licensee concludes that the more frequent inspections, plus inspecting all valves of a given type at the same time, should result in increased reliability of the turbine overspeed protection system.

As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated. The vendor has confirmed that the proposed inspection frequency has no effect on the turbine-generator missile analysis, since the analysis does not have a component which includes valve inspection frequency. The 60-month inspection interval is consistent with the vendor's recommendations for valves in this type of service. The net effect of the proposed change will be more frequent inspections for each valve. This should have a positive effect on the reliability of these valves.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed amendment does not involve any changes in design or operating parameters for these valves. They will continue to perform their function as intended and as assumed in the accident analyses. The proposed amendment only affects the frequency at which these valves will be disassembled and inspected, the net effect of which should be improved reliability.



3. The proposed amendment does not involve a significant reduction in a margin of safety. As stated above, the vendor has confirmed that the proposed amendment has no effect on the turbine-generator missile analysis. Furthermore, with an increased inspection frequency, the valves should be able to perform their intended function with increased reliability.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
Location: Burke County Public Library,  
412 Fourth Street, Waynesboro, Georgia  
30830.

**Attorney for licensee:** Mr. Arthur H. Domby, Troutman, Sanders, Lockerman and Ashmore, Candler Building, Suite 1400, 127 Peachtree Street, NE., Atlanta, Georgia 30043-1810.

**NRC Project Director:** David B. Matthews

**Houston Lighting & Power Company,**  
City Public Service Board of San  
Antonio, Central Power and Light  
Company, City of Austin, Texas, Docket  
No. 50-498, South Texas Project, Unit 1,  
Matagorda County, Texas

**Date of amendment request:** May 26,  
1992

**Description of amendment request:**  
The licensee requested a one-time change to the Technical Specification (TSs) to extend the 40-month inspection interval for the Unit 1 turbine valves to approximately 52 months. The inspection was last performed during the first refueling outage (1RE01, which ended on October 19, 1989). A 40-month inspection interval indicates that another inspection is due in February 1993. However, the licensee stated that work was done on the stop and governor valves during the second refueling outage (which ended June 1990), and the application of the 25% allowable extension (TS 4.0.2) from the first refueling outage would result in an inspection interval of 50 months.

**Basis for proposed no significant hazards consideration determination:**  
As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated. This one-time extension of the inspection interval is not significant because of the relatively small increase in the inspection interval, and due to the inspection

and enhancement of selected valve components accomplished during 1RE02. The change has no effect on the consequences of such an event.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated. The effects of turbine missiles are addressed in Section 3.5.1.3 of the Updated Final Safety Analysis Report.

3. The proposed change does not involve a significant reduction in the margin of safety. The increase in the inspection interval is relatively small, and selected valves were inspected with enhancement of valve components during 1RE02.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Rooms**  
Location: Wharton County Junior  
College, J. M. Hodges Learning Center,  
911 Boling Highway, Wharton, Texas  
77488

**Attorney for licensee:** Jack R. Newman, Esq., Newman & Holtzinger, P.C., 1615 L Street, NW, Washington, DC 20036

**NRC Project Director:** Suzanne C. Black

**Niagara Mohawk Power Corporation,**  
Docket No. 50-220, Nine Mile Point  
Nuclear Station Unit No. 1, Oswego  
County, New York

**Date of amendment request:** May 27,  
1992

**Description of amendment request:**  
The proposed amendment would revise Technical Specification (TS) Figure 2.1.1 (Flow Biased Scram and APRM Rod Block), TS 3.1.7 (Fuel Rods), and associated Bases to replace cycle specific limits with requirements that the reactor be operated within the requirements of limits specified in the Core Operating Limits Report (COLR). TS 6.9.1.f (Core Operating Limits Report) would be revised to require that the cycle specific parameters proposed to be removed from TS Figure 2.1.1, TS 3.1.7, and associated Bases be included in the COLR. The proposed amendment would also correct two typographical errors on pages 64a and 64c of TS 3.1.7. The proposed amendment is in accordance with the guidance provided in NRC Generic Letter (GL) 88-16 "Removal of Cycle-Specific Parameter Limits From Technical Specifications."

**Basis for proposed no significant hazards consideration determination:**  
As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards

consideration, which is presented below:

*The operation of Nine Mile Point Unit 1 in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.*

To reduce the administrative burden of amending Technical Specifications for each fuel cycle, Generic Letter 88-16 authorized the removal of cycle specific values from Technical Specifications and their inclusion in the COLR which is controlled administratively by Section 6.0 of Technical Specifications. This proposed amendment is in conformance with the guidance specified by GL 88-16. Cycle specific parameters will still be derived by NRC approved methodology. Technical Specification requirements for adherence to these parameters will remain unchanged; as a result there is no increase in the probability or consequences of previously evaluated accidents.

In addition two typographical errors were corrected at Page 64a, the word "with" should be "within" and on Page 64c, the word "in" should be "is". These errors which exist in the current Technical Specifications are typographical only, correction does not alter the meaning or intent of any requirements. As such this correction will not increase the probability or consequences of an accident previously analyzed.

*The operation of Nine Mile Point Unit 1 in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.*

This proposed amendment will not alter either plant operation or design specifications. This amendment is limited to the relocation of cycle specific parameters contained in the Technical Specifications to the COLR. Technical Specification requirements for adherence to these limits remains unchanged. NRC approved methodology will still be required to derive these cycle specific parameters. Since neither the derivation of the cycle specific parameters nor adherence requirements to these parameters is altered, no new or different kind of accident is created.

In addition two typographical errors were corrected at Page 64a, the word "with" should be "within" and on Page 64c, the word "in" should be "is". These errors which exist in the current Technical Specifications are typographical only, correction does not alter the meaning or intent of any requirements. These corrections will not create the possibility of a new or different kind of accident from any accident previously evaluated.

*The operation of Nine Mile Point Unit 1 in accordance with the proposed amendment will not involve a significant reduction in a margin of safety.*

Plant operation and adherence to design limits remains unchanged. This change allows cycle specific parameters derived from NRC approved methodology to be relocated to the COLR which is controlled and approved in accordance with Section 6 of Technical Specifications. This change is in



compliance with Generic Letter 88-16 and as such does not involve a significant reduction in a margin of safety.

In addition two typographical errors were corrected at Page 64a, the word "with" should be "within" and on Page 64c, the word "in" should be "is". These errors which exist in the current Technical Specifications are typographical only; correction does not alter the meaning or intent of any requirements and therefore does not result in a reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Reference and Documents  
Department, Penfield Library, State  
University of New York, Oswego, New  
York 13126.

**Attorney for licensee:** Mark J.  
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1400 L Street, NW., Washington, DC  
20005-3502.

**NRC Project Director:** Robert A.  
Capra

**Northeast Nuclear Energy Company, et  
al., Docket No. 50-423, Millstone Nuclear  
Power Station, Unit No. 3, New London  
County, Connecticut**

**Date of amendment request:** May 1,  
1992

**Description of amendment request:**  
The proposed amendment request would  
change the Technical Specifications to  
revise the visual inspection surveillance  
schedule for snubbers for the present  
inspection interval only. The present  
Technical Specifications would require  
inspection sooner than an outage of  
sufficient duration according to present  
schedules. The proposed Technical  
Specification would extend the time by  
which inspection is required to the  
fourth refueling outage (now scheduled  
for June 1993) in accordance with the  
new snubber surveillance criterion  
which had been approved by the staff in  
License Amendment 62 (September 3,  
1991) for use in inspection intervals  
subsequent to the present interval.

**Basis for proposed no significant  
hazards consideration determination:**  
As required by 10 CFR 50.91(a), the  
licensee has provided its analysis of the  
issue of no significant hazards  
consideration, which is presented  
below:

The proposed change does not involve a  
significant hazards consideration because the  
change would not:

1. Involve a significant increase in the  
probability or consequences of an accident  
previously analyzed.

The proposed change will have a negligible  
effect upon the probability of occurrence of  
accidents previously evaluated. Although the  
snubber visual inspection cycle is being  
lengthened, it provides essentially the same  
confidence level as the original schedule  
when performed in conjunction with snubber  
functional testing. The snubber functional  
testing program acts to provide a 95 percent  
confidence level that 90 to 100 percent of the  
snubber population will operate within  
specified acceptance limits. Visual  
examinations are a separate process which  
tend to complement the functional testing  
program. The visual inspections, alone, have  
a negligible effect upon the reliability of  
snubbers. In addition, the ACTIONS required  
by the existing technical specifications as a  
result of finding snubbers inoperable remains  
the same. Therefore, the proposed change  
does not affect the probability or  
consequences of an accident previously  
evaluated.

2. Create the possibility of a new or  
different kind of accident from any  
previously analyzed.

The proposed change does not affect any  
plant operations, the potential for an  
unanalyzed accident is not created, and no  
new failure modes are introduced. The  
proposed change will not affect the  
operability of the snubbers to perform their  
intended function during normal or accident  
conditions.

3. Involve a significant reduction in the  
margin of safety.

The inspection schedule defined in  
Technical Specification Table 4.7-2 provides  
the same level of confidence as the previous  
schedule (i.e., criterion in effect prior to  
Amendment No. 62). Snubber functional  
testing provides a 95 percent confidence level  
that 90 to 100 percent of the snubbers will  
operate within specified acceptable limits.  
Visual inspections act only to complement  
and reinforce the functional testing program.  
In addition, the proposed change does not  
affect any of the ACTIONS specified in the  
technical specifications which result from  
identification of inoperable snubbers.  
Therefore, the proposed change does not  
involve a significant reduction in a margin of  
safety.

The NRC staff has reviewed the  
licensee's analysis and, based on this  
review, it appears that the three  
standards of 10 CFR 50.92(c) are  
satisfied. Therefore, the NRC staff  
proposes to determine that the  
amendment request involves no  
significant hazards consideration.

**Local Public Document Room**  
location: Learning Resources Center,  
Thames Valley State Technical College,  
574 New London Turnpike, Norwich,  
Connecticut 06360.

**Attorney for licensee:** Gerald Garfield,  
Esquire, Day, Berry & Howard, City  
Place, Hartford, Connecticut 06103-3499.

**NRC Project Director:** John F. Stolz

**Omaha Public Power District, Docket  
No. 50-285, Fort Calhoun Station, Unit 1,  
Washington County, Nebraska**

**Date of amendment request:** June 1,  
1992

**Description of amendment request:**  
The proposed amendment would  
implement Generic Letter 89-01  
concerning the Radiological Effluent  
Technical Specifications (RETS), and to  
revise the requirements for the  
Containment Radiation High Signal  
following the guidance of NUREG-0133.

**Basis for proposed no significant  
hazards consideration determination:**  
As required by 10 CFR 50.91(a), the  
licensee has provided its analysis of the  
issue of no significant hazards  
consideration, which is presented  
below:

1. Involve a significant increase in the  
probability or consequences of an accident  
previously evaluated.

The removal of the present Radiological  
Effluent Technical Specifications to the  
Offsite Dose Calculation Manual in  
accordance with the guidelines presented in  
Generic Letter 89-01 will not cause any  
increase in the probability or consequences  
of an accident. Only the procedural details  
have been transferred to the ODCM.  
Programmatic controls have been retained or  
added to ensure continued compliance with  
federal requirements.

The removal of VIAS signals from the  
particulate and iodine radiation monitors will  
not cause an increase in the probability or  
consequences of an accident. Initial  
indications for radioactive release will occur  
promptly on the noble gas radiation monitors.  
VIAS will be initiated as soon as the  
Auxiliary Building Exhaust Stack or the  
Containment noble gas monitor reaches its  
alarm setpoint. The removal of the particulate  
and iodine monitors will not alter the  
initiation of VIAS in any postulated accident.

2. Create the possibility of a new or  
different kind of accident from any  
previously analyzed.

The relocation of RETS from Technical  
Specifications to the ODCM is an  
administrative change. Present tests,  
calibrations, or inspections necessary to  
ensure the quality of systems and  
components will continue to be performed,  
and this change will not create a new or  
different kind of accident. The removal of the  
VIAS input from the particulate and iodine  
radiation monitors is the result of the  
recognition, by NRC documents, of the  
impracticality of applying instantaneous  
alarm setpoints to integrating radiation  
monitors. The primary and fastest indications  
of an actual radioactive release are noble  
gases. The radiation monitors for noble gases  
will continue to provide inputs for VIAS.  
Therefore, no new or different kind of  
accident been created.

3. Involve a significant reduction in the  
margin of safety.

The administrative changes made will not  
cause a reduction in the margin of safety. The  
present RETS requirements are retained in



the ODCM with Programmatic Controls in the Technical Specifications. This is consistent with the guidance of Generic Letter 89-01.

The removal of VIAS inputs from the particulate and iodine radiation monitors will not cause a significant reduction in the margin of safety. The primary indicators for radioactive releases, noble gases, will still be monitored and will initiate VIAS upon reaching their alarm setpoints. Spurious alarms, due to the incorrect application of instantaneous limits to integrating monitors will be eliminated, reducing the functional requirements that the Engineered Safeguard Features must comply with and enhance the reliability of VIAS. Noble gas concentrations are approximately 10,000 times greater than the particulate and iodine concentrations, therefore the margin of safety in detecting radioactive releases will be retained.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: University of New Orleans  
Library, Louisiana Collection, Lakefront,  
New Orleans, Louisiana 70122

**Attorney for licensee:** N.S. Reynolds,  
Esq., Winston & Strawn 1400 L Street  
N.W., Washington, D.C. 20005-3502

**NRC Project Director:** John T. Larkins

**Philadelphia Electric Company, Docket**  
**Nos. 50-352 and 50-353, Limerick**  
**Generating Station, Units 1 and 2,**  
**Montgomery County, Pennsylvania**

**Date of amendment request:** May 19,  
1992

**Description of amendment request:**  
The amendments would change Sections 6.3.1 and 6.4.1 of the Technical Specifications (TSs) to clarify the current requirements for licensed operator qualifications and training for the Limerick Generating Station (LGS), Units 1 and 2. These changes are being proposed to delete TS requirements that are superseded based on the licensed operator training programs being accredited and based on a "systems approach to training," and promulgation of the revised 10 CFR [Part] 55, "Operator Licenses," which became effective on May 26, 1987. Specifically, the changes would:

1. Delete the requirement from TS Section 6.3.1 that licensed operators shall meet or exceed the minimum qualifications of "ANSI/ANS 3.1 1978" and "the supplemental requirements specified in Sections A and C of Enclosure 1 of the March 28, 1980 NRC letter to all licensees."

2. Delete the requirement from TS Section 6.4.1 that the licensed operator

retraining and replacement training programs "...shall meet or exceed the requirements of ANSI/ANS 3.1-1978..." and the supplemental requirements specified in Sections A and C of Enclosure 1 of the March 28, 1980 NRC letter to all licensees. . . ."

**Basis for proposed no significant hazards consideration determination:**  
As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed TS changes to not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed TS changes are administrative changes to clarify the current requirements for licensed operator qualifications and training programs. Although licensed operator qualifications and training can have an indirect impact on accidents previously evaluated, the NRC considered this impact during the rulemaking process, and by promulgation of the rule, concluded that this impact remains unchanged as long as licensed operator training programs are certified to be accredited and based on a systems approach to training in response to [Generic Letter] GL 87-07. PECO provided such certification for LGS, Units 1 and 2, by letters dated April 27, 1990 and June 19, 1990. The proposed TS changes take credit for the INPO accreditation of the licensed operator training programs and require continued compliance with the requirements of 10 CFR [Part] 55. The TS requirements for all other unit staff qualifications and training programs remain unchanged. Therefore, the proposed TS changes do not increase the probability or consequences of an accident previously evaluated.

2. The proposed TS changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed TS changes are administrative changes to clarify the current requirements for licensed operator qualifications and training programs. Although licensed operator qualifications and training can have an indirect impact on the possibility of a new or different kind of accident from any accident previously evaluated, the NRC considered this impact during the rulemaking process, and by promulgation of the rule, concluded that this impact remains unchanged as long as licensed operator training programs are certified to be accredited and based on a systems approach to training in response to GL 87-07. PECO provided such certification for LGS, Units 1 and 2, by letters dated April 27, 1990 and June 19, 1990. The proposed TS changes take credit for the INPO accreditation of the licensed operator training programs and require continued compliance with the requirements of 10 CFR [Part] 55. The TS requirements for all other unit staff qualifications and training programs remain unchanged. Additionally, the proposed TS

changes do not affect plant design, hardware, system operation, or procedures. Therefore the proposed TS changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed TS changes do not involve a significant reduction in a margin of safety.

The proposed TS changes are administrative changes to clarify the current requirements applicable to licensed operator qualifications and training programs. The TS requirements for the qualifications and training programs for all other unit staff remain unchanged. The licensed operator qualifications and training programs will continue to be required to comply with the requirements of 10 CFR [Part] 55. Licensed operator qualifications and training can have an indirect impact on a margin of safety. However, the NRC considered this impact during the rulemaking process, and by promulgation of the revised 10 CFR [Part] 55, determined that this impact remains unchanged when licensees certify that their licensed operator training programs are accredited and based on a systems approach to training in response to GL 87-07. PECO provided such certification for LGS, Units 1 and 2, by letters dated April 27, 1990 and June 19, 1990. The NRC has concluded, as stated in NUREG-1262, that the standards and guidelines applied by INPO in their training accreditation program are equivalent to those put forth or endorsed by the NRC. As a result, maintaining INPO accredited, systems based licensed operator training programs is equivalent to maintaining NRC approved licensed operator training programs which conform with applicable NRC RGs [Regulatory Guides] or NRC endorsed ANSI/ANS standards. The margin of safety is maintained by virtue of maintaining INPO accredited licensed operator training programs and through continued compliance with the requirements of 10 CFR [Part] 55. Therefore, the proposed TS changes do not reduce a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Pottstown Public Library, 500  
High Street, Pottstown, Pennsylvania  
19464.

**Attorney for licensee:** J. W. Durham,  
Sr., Esquire, Sr. V. P. and General  
Counsel, Philadelphia Electric Company,  
2301 Market Street, Philadelphia,  
Pennsylvania 19101

**NRC Project Director:** Charles L.  
Miller



Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania

*Date of application for amendments:* May 18, 1992

*Description of amendment request:*

The amendment proposes changes to Section 4.6.D of the Technical Specifications. The amendment would change the inspection and testing requirements for the Main Steam Line Safety Valves (SV) and Relief Valves (RV). The proposed changes would require that at least one safety valve and five relief valves be checked or replaced with a bench checked valve every 24-months. Currently, the valves are required to be checked every operating cycle. The changes are proposed in order for the licensee to operate with a 24-month fuel cycle.

Additionally, the changes would require that one of the relief valves be disassembled and inspected every 24-months. Currently, one relief valve is required to be disassembled and inspected every refueling outage.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The two change requests proposed in this application do not constitute a significant hazards consideration in that:

i) The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated because the availability and response of the valves in the event of an accident is unchanged. The changes being proposed do not change any of the accident precursors; therefore, the probability of an accident remains the same. The availability of the valves to mitigate the consequences of an accident remain essentially the same. Any change in the possibility of a failure in these valves due to less frequent testing is insignificant given that the surveillance history does not indicate any time based failure mechanism.

ii) The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated because the proposed change does not make any physical changes to the plant and the extension of the surveillance interval will not introduce any new failure mechanisms. No physical changes to the plant are being made as a result of this request; therefore, no new accident initiators or precursors are being introduced. The only change being proposed is an extension of an existing surveillance test for the Main Steam SV and RV. The existing evaluation for PBAPS has already considered the failure of a MS RV. The

extended operating time does not introduce any new accidents scenarios.

iii) The proposed changes do not involve a significant reduction in a margin of safety because the proposed surveillance frequency is adequate to detect SV/RV failures or deteriorations. It can be concluded that an increase in the interval to reflect a 24 month operating cycle will have a negligible impact on the margin of safety. The ability to detect a failure or deterioration in the performance of SV and RV is essentially unchanged by extending the surveillance frequency; therefore, the likelihood that these valves are available to perform their design functions is the same and the margin of safety provided by these valves is essentially unchanged.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Local Public Document Room location:* Government Publications Section, State Library of Pennsylvania, (REGIONAL DEPOSITORY) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

*Attorney for licensee:* J. W. Durham, Sr., Esquire, Sr. V. P. and General Counsel, Philadelphia Electric Company, 2301 Market Street, Philadelphia, Pennsylvania 19101

*NRC Project Director:* Charles L. Miller

**The Cleveland Electric Illuminating Company, Centerior Service Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, Toledo Edison Company, Docket No. 50-440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio**

*Date of amendment request:* February 28, 1992

*Description of amendment request:* The amendment would revise the Perry Nuclear Power Plant, Unit 1 Technical Specifications to remove the requirement for fuel pool criticality monitors from Tables 3.3.7.1-1 and 4.3.7.1-1.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

The only type of accident potentially affected by removing the criticality monitors from the Technical Specifications would be an accidental criticality event. All the other types of potential accidents/events involving fuel and fuel handling (e.g., dropping a fuel bundle) are unaffected by this change. Therefore, only the criticality related aspects are discussed below.

1. As discussed within Attachment 2 to this letter [the licensee's letter of February 28, 1992], the safety evaluations concerning the nuclear design and criticality controls for each of the fuel pools/rack types are contained within Sections 9.1.1 and 9.1.2 of the Updated Safety Analysis Report (USAR). An accidental criticality is precluded by the geometry of the racks, overmoderation, and for one rack design the use of a neutron absorbing material. These conditions apply for the racks in the fuel preparation and storage pools, spent fuel pool, and upper containment pool. For the racks within the new fuel storage vaults, accidental criticality is precluded by geometry and undermoderation or overmoderation for the dry and flooded conditions respectively. For the condition of optimum moderation within the new fuel storage vaults, accidental criticality is prevented by the use of administrative controls such as solid vault covers and storage of the new fuel in alternate rows and columns as previously approved within the Special Nuclear Materials license. As noted in the NRC Safety Evaluation that accompanied the March 1985 Special Nuclear Materials license, storage of fuel in alternate rows and columns alone eliminates any criticality concern since the fuel cannot be made critical under any degree of moderation. The probability of occurrence of an accidental criticality for the various fuel storage pools is unaffected by this proposed change since accidental criticality is precluded by design features (geometry, use of neutron absorbing material) and the probability for the new fuel vaults is also unaffected even for the special case of optimum moderation, where administrative controls are applied to preclude the event when the vaults are in use. The probability and consequences of an inadvertent criticality are therefore unchanged from those described within the USAR. The criticality monitors only provide an alarm function and initiate no action to prevent or mitigate an event. Therefore, the probability of occurrence and consequences are not significantly increased by removal of the criticality monitors from the Technical Specifications.

2. Removing the criticality monitors from the Technical Specifications can in no way introduce a new accident as they provide only an alarm function for in-plant personnel safety, which is not necessary since criticality is precluded by design or administrative controls. The installed monitors continue to function as area radiation monitors. The monitors are essentially passive and serve no preventive or accident mitigation function. Since they perform no active function, removal of the alarms from the Technical Specifications cannot introduce the possibility of a new or different kind of accident from any previously evaluated.

3. For the reasons previously discussed a significant reduction in the margin of safety is not involved because an accidental criticality is precluded by design considerations, i.e., the geometry of the racks, overmoderation, and for the high density rack design, the use of a neutron absorbing material. These



conditions apply for the racks where fuel is stored/handled underwater. For the new fuel storage vaults, accidental criticality is precluded by design considerations, i.e., geometry and undermoderation or overmoderation for the dry and flooded conditions respectively, and for the condition of optimum moderation, criticality is prevented by administrative controls (as discussed above). Therefore, the proposed removal from the Technical Specifications of the criticality monitors does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Perry Public Library, 3753 Main Street, Perry, Ohio 44081.

**Attorney for licensee:** Jay Silberg, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

**NRC Project Director:** John N. Hannon.

**The Cleveland Electric Illuminating Company, Centerior Service Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, Toledo Edison Company, Docket No. 50-440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio**

**Date of amendment request:** March 18, 1992

**Description of amendment request:** The amendment would revise the Perry Nuclear Power Plant (PNPP), Unit 1 Technical Specifications to remove the requirement for controls to the Reactor Core Isolation Cooling (RCIC) pump discharge to lube oil cooler valve from Table 3.3.7.4-1, "Remote Shutdown System Controls". The licensee plans to convert this valve from a normally closed, motor operated valve to a locked open manual valve.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

(1) The proposed change does not involve a significant increase in the probability or the consequences of an accident previously evaluated.

First, the proposed change does not involve a significant increase in the probability of an occurrence of an accident previously evaluated in PNPP's Updated Safety Analysis Report (USAR). The Reactor Core Isolation Cooling (RCIC) system is a standby system during normal plant operation, and is designed as a system to respond to help mitigate transients/accidents that have

already occurred. Therefore, changing the RCIC pump discharge to lube oil cooler valve from a normally closed motor-operated valve with controls in the Remote Shutdown Room to a locked open manually operated valve would not cause the probability of an accident previously evaluated in the PNPP USAR Chapter 15, to increase. And since this valve is not a containment or reactor pressure boundary valve during normal operation, the design change does not subject any more piping to reactor pressure and does not increase the probability of a loss of coolant accident (LOCA). Consequently, the proposed change does not increase the probability of any accident previously evaluated.

In addition, the proposed change does not involve a significant increase in the consequences of an accident previously evaluated. The proposed change does not affect the RCIC system operation as described in PNPP's USAR section 5.4.6. By changing the valve to a normally open valve, there is one less active component relied upon for the RCIC system to perform its design function, resulting in a more reliable RCIC system operation. By changing the RCIC pump discharge to lube oil cooler valve to a normally open valve, the list of active components required for the RCIC system to operate is reduced by one. By reducing the number of active components required for the RCIC system to operate, the reliability of the RCIC system is actually enhanced by the proposed change. By changing the valve to a normally open valve, cooling water to the RCIC lube oil cooler will always be available when the RCIC pump runs, and will no longer depend on the opening of valve 1E51-F046, thereby further enhancing the reliability of the RCIC system as well as reducing the probability of a malfunction of equipment important to safety. Consequently, the proposed change does not involve an increase in the consequences of an accident previously evaluated in PNPP's USAR. Furthermore, there is no resultant increase in post-accident radiological release rate, duration or radionuclide population as a consequence of making the valve normally open or manually operated.

Based upon the above, the proposed change cannot increase the probability or the consequences of any accident previously evaluated.

(2) The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated in PNPP's USAR because the RCIC system function and operability will remain unaffected by this proposed change. Valve 1E51-F046 will be a normally open valve during RCIC system operation to ensure a supply of cooling water to the lube oil cooler. To prevent inadvertent mispositioning, the valve will be locked in the open position. As a result, no new failure modes are introduced.

(3) The proposed change does not result in a significant reduction in the margin of safety, because the proposed change has no effect on the function of the RCIC system or its ability to perform its safety function. Consequently, the proposed change still provides adequate assurance that the applicable RCIC safety functions are capable

of performing their intended function when required. Therefore, this change does not reduce the margin of safety as defined in the basis for any Technical Specification.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Perry Public Library, 3753 Main Street, Perry, Ohio 44081.

**Attorney for licensee:** Jay Silberg, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

**NRC Project Director:** John N. Hannon.

**Union Electric Company, Docket No. 50-483, Callaway Plant, Unit 1, Callaway County, Missouri**

**Date of amendment request:** December 18, 1991

**Description of amendment request:** The proposed amendment would revise Technical Specification Section 4.4.9.1.2, Figures 3.4-2, 3.4-3, and 3.4-4, Tables 4.4-5 and B 3/4.4-1 and associated Bases for Reactor Coolant System Pressure/Temperature Limits by modifying plant heatup and cooldown curves and the maximum allowable PORV setpoint curve for cold overpressure protection.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91 (a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below: The modifications of the plant heatup and cooldown limitation curves and PORV Setpoint Curve (Figures 3.4-2, 3.4-3, and 3.4-4) are to incorporate the revised RT<sub>NDT</sub>. The revision to Bases Table B 3/4.4-1 is editorial in nature only.

1. This change does not involve a significant increase in the probability or consequences of an accident previously evaluated. This amendment merely ensures that the acceptable range of operation is clearly defined using conservative and validated data obtained from the analysis of surveillance capsule Y and previously utilized methods of specimen analysis.

2. The change does not create the possibility of a new or different kind of accident from any accident previously evaluated. There is no new type of accident or malfunction being created and the method and manner of plant operation remains the same. This change is based upon NRC and Westinghouse methodologies which do not impact the accident analysis.

3. This change does not involve a significant reduction in a margin of safety.



This is based on the fact that the change only revises the heatup and cooldown curves to reflect operational parameters based on surveillance capsule data. The recalculated limit curves have the same degree of conservatism as the original curves, since they are based on the most limiting values of the nil-ductility reference temperature which includes the radiation induced shift (change in  $RT_{NDT}$  as determined by the surveillance capsule analysis).

The specimen withdrawal schedule is being removed from the Technical Specifications in accordance with the recommendations of NRC Generic Letter 91-91. This table will be maintained in the Callaway FSAR. The removal of this table from the technical specifications will not result in any loss of regulatory control requirements of 10CFR50, Appendix H.

1. This change does not involve a significant increase in the probability or consequences of an accident previously evaluated. This change is administrative in nature only.

2. The change does not create the possibility of a new or different kind of accident from any accident previously evaluated. There is no new type of accident or malfunction being created and the method and manner of plant operation remains the same.

3. This change does not involve a significant reduction in a margin of safety. This is based on the fact that the specimen withdrawal schedule is controlled by the requirements of 10CFR50, Appendix H. The removal of this table from technical specifications is purely administrative and does not impact any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room location:** Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251.

**Attorney for licensee:** Gerald Charnoff, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, N.W., Washington, DC 20037.

**NRC Project Director:** John N. Hannon

**Union Electric Company, Docket No. 50-483, Callaway Plant, Unit 1, Callaway County, Missouri**

**Date of amendment request:** January 14, 1992

**Description of amendment request:** The proposed amendment would revise Technical Specification Sections 3/4.2.1, 4.2.2.2 through 4.2.2.4, 6.9.1.9, Table 2.2-1 and associated Bases for Power Distribution Limits in order to implement relaxed axial offset control (RAOC) for Cycle 6 at Callaway. The RAOC methodology supporting this proposed change is consistent with

WCAP-10216-PA which has been previously reviewed and approved by the NRC.

**Basis for proposed no significant hazards consideration determination:**

As required by 10 CFR 50.91 (a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The RAOC-related technical specification changes do not significantly increase the probability or consequences of any accident previously evaluated in the FSAR. No new performance requirements are being imposed on any system or component in order to support the RAOC implementation. Subsequently, overall plant integrity is not reduced, furthermore, the parameter changes associated with RAOC assure that the limiting safety analysis inputs (i.e.  $F_Q$ , AFD and F-delta-H) are not exceeded. Mitigators to assumed accident scenarios, such as the  $f_i$  (delta-I) penalty term in the OTDT setpoint, are not accident initiators. Therefore, the probability of an accident has not increased.

The consequences of any accident previously evaluated in the FSAR are not increased due to the RAOC-related Technical Specification changes. Since the results of the LOCA and non-LOCA analyses remain applicable, the inputs to the dose analyses do not change. Therefore, the consequences to the public resulting from any accident previously evaluated in the FSAR has not increased.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not involve any design changes or hardware modifications to safety-related equipment nor will there be a change in the method by which any safety-related plant system performs its safety function. There will be a conservative trip setpoint-reducing change to the negative  $f_i$  (delta-I) penalty term in the OTDT setpoint equation, as well as changes to the non-safety related AFD Monitor Alarm since penalty deviation times will be no longer be tracked or alarmed.

The RAOC-related Technical Specification changes do not create the possibility of a new or different kind of accident than any already evaluated in the FSAR. No new accident scenarios, failure mechanisms or limiting single failures are introduced as a result of the RAOC implementation. The institution of RAOC will have no adverse effect and does not challenge the performance of any safety-related system. Therefore, the possibility of a new or different kind of accident is not created.

3. Involve a significant reduction in a margin of safety.

The proposed change will not result in a decrease in the minimum DNBR given in Bases Section 2.1.1 and reported in the FSAR nor will there be an increase in the peak clad temperature (PCT) above the 2200°F ECCS Acceptance Criteria limit as defined in 10CFR50.46. The design limits on peak local

power density,  $F_Q$ , and F-delta-H will not be exceeded. The proposed change does not alter the manner in which safety limits or limiting safety system limiting condition for operation and  $F_Q$  surveillance are revised in accordance with the approved methodology of WCAP-10216-PA.

The supporting Technical Specification values are defined by the accident analyses which are performed to conservatively bound the operating conditions defined by the Technical Specifications and to demonstrate meeting the regulatory acceptance limits. Performance of analyses and evaluations for the RAOC transition have confirmed that the operating envelope defined by the Technical Specifications continues to be bounded by the analytical basis, which in no case exceeds the acceptance limits. Therefore, the margin of safety provided by the analyses in accordance with the acceptance limits is maintained and not reduced.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room location:** Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251.

**Attorney for licensee:** Gerald Charnoff, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, N.W., Washington, DC 20037.

**NRC Project Director:** John N. Hannon

**Virginia Electric and Power Company, Docket Nos. 50-338 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia**

**Date of amendment request:** May 1, 1992

**Description of amendment request:** The proposed change would revise the NA-1&2 Technical Specifications (TS) 3.7.4.1.a, "Service Water System - Operating." Specifically, the proposed change would permit mode changes while in Action Statement 3.7.4.1.a by stating that TS 3.0.4 is not applicable once service water (SW) flows to the component cooling heat exchangers are throttled. The current action statement permits continued operation for an unlimited period of time with one SW pump inoperable provided flow to the component cooling water (CCW) heat exchangers are throttled to ensure that the remaining SW pumps deliver design basis flows to the recirculation spray heat exchangers. Since design basis flows are met upon completion of throttling the CCW heat exchanger flows, progression through modes would not be outside the design basis. However, TS 3.0.4 does not permit mode



changes once an action statement is entered. NRC Generic Letter (GL) 89-07, "Sections 3.0 and 4.0 of the Standard Technical Specifications on the Applicability of Limiting Conditions for Operation and Surveillance Requirements," was issued to address several TS improvements. An issue addressed in the GL involved the unnecessary restrictions on mode changes by TS 3.0.4. In the GL the NRC states that TS 3.0.4 unduly restricts operation when conformance to the action statement provides an acceptable level of safety for continued operation. Therefore, making TS 3.0.4 not applicable in Action Statement 3.7.4.1.a would be in conformance with the NRC position stated in GL 89-07.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed change has no adverse impact upon potential accident probability or consequence. The proposed change will allow progression through modes upon conformance with the action statement which ensures the design basis is met. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Likewise, the consequences of the accidents will not increase as a result of the proposed Technical Specification change.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change will allow progression through modes upon conformance with the action statement which ensures the design basis is met. Therefore, the proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated in the [Updated Final Safety Analysis Report (UFSAR)].

3. The proposed change does not involve a significant reduction in a margin of safety. The results of the UFSAR accident analyses continue to bound operation under the proposed change. The proposed change will allow progression through modes upon conformance with the action statement which ensures the design basis is met. Therefore, the margins of safety are maintained without reduction.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903-2498.

**Attorney for licensee:** Michael W. Maupin, Esq., Hunton and Williams, P.O. Box 1535, Richmond, Virginia 23212.

**NRC Project Director:** Herbert N. Berkow

**Washington Public Power Supply System, Docket No. 50-397, Nuclear Project No. 2, Benton County, Washington**

**Date of amendment request:** April 10, 1992, as supplemented May 20, 1992

**Description of amendment request:** The proposed amendment revises action statements, LCOs, surveillances and bases associated with TS 3.4.3.1, "Leakage Detection Systems" and TS 3.4.3.2, "Operational Leakage." These changes are in response to Generic Letter 88-01, "NRC Position on IGSCC in BWR Austenitic Stainless Steel Piping" and its Supplement 1. Specifically, the proposed amendment modifies Technical Specifications to the sections related to leak detection so that they will conform to the Staff's position.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1) The change to the operational leakage program does not involve a significant increase in the probability of an accident previously evaluated because leakage monitoring is not assumed as the initiator of any analyzed event. In addition, the change does not involve a significant increase in the consequences of an accident as the additional shutdown requirement and the increased surveillance requirements for leak detection may facilitate earlier detection of a failure associated with IGSCC.

2) The changes do not create the possibility of a new or different kind of accident from any accident previously evaluated because the proposed changes do not introduce any new mode of plant operation or require any physical modification to the plant.

3) There is no reduction in a margin of safety due to these changes because the additional shutdown requirement and the additional surveillances have been established to assure the earliest possible detection of problems with or the need of repair or replacement of piping that may be susceptible to failure due to IGSCC. These changes clearly enhance safety and increase margins, by the implementation of the more restrictive LCO, ACTIONS and Surveillance Requirements.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied.

Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: Richland Public Library, 955 Northgate Street, Richland, Washington 99352

**Attorney for licensee:** Nicholas S. Reynolds, Esq., Winston & Strawn, 1400 L Street, N.W., Washington, D.C. 20005-3502

**NRC Project Director:** Theodore R. Quay

**Yankee Atomic Electric Company, Docket No. 50-029, Yankee Nuclear Power Station (YNPS), Franklin County, Massachusetts**

**Date of amendment request:** February 3, 1992

**Description of amendment request:** The proposed amendment would remove the 3.25 limit on extending surveillance intervals in the Technical Specifications, following the guidance of the NRC Generic Letter 89-14 dated August 21, 1989.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.92(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

This proposed change is requested to incorporate the guidance provided in Generic Letter 89-14 into the TS of YNPS. This guidance provided a specific acceptable alternative to the existing requirements of Specification 4.0.2. As such, this proposed change would not:

1. Involve a significant increase in the probability or consequences of any accident previously evaluated. This change in the wording of Specification 4.0.2 provides comparable requirements to existing wording to insure the operability of required systems and as such, does not involve a significant increase in the probability or consequence of any accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any previously evaluated. This change only affects the wording contained in the Technical Specifications and as such, does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Involve a significant reduction in a margin of safety. This wording change does not affect any Technical Specification margin of safety and as such, does not involve a significant reduction in a margin of safety.

Based on the above discussion, it is concluded that there is reasonable assurance that the operation of YNPS consistent with this proposed change will not endanger the health and safety of the public.

This proposed change has been reviewed and approved for implementation by the



Plant Operation Review Committee and the Nuclear Safety Audit and Review Committee.

The NRC staff has reviewed the licensee's analysis, and based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**

**location:** Greenfield Community College, 1 College Drive, Greenfield, Massachusetts 01301

**Attorney for licensee:** Thomas Dignan, Esquire, Ropes and Gray, One International Place, Boston, Massachusetts 02110-2624

**NRC Project Director:** Seymour H. Weiss

**Notice of Issuance of Amendment to Facility Operating License**

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

**Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing in connection with these actions** was published in the *Federal Register* as indicated. No request for a hearing or petition for leave to intervene was filed following this notice.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendments, (2) the amendments, and (3) the Commission's related letters, Safety Evaluations and/or Environmental Assessments as indicated. All of these items are

available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, D.C., and at the local public document rooms for the particular facilities involved. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects.

**Commonwealth Edison Company, Docket Nos. 50-295 and 50-304, Zion Nuclear Power Station, Units 1 and 2, Lake County, Illinois**

**Date of application for amendments:** November 7, 1991, as supplemented February 6, March 13, and April 3, 1992.

**Brief description of amendments:** The amendments revise the Technical Specifications to permit the replacement of the current air start system for the Emergency Diesel Generators with a new high pressure system.

**Date of issuance:** June 5, 1992

**Effective date:** Immediately to be implemented within 30 days.

**Amendment Nos.:** 137 and 128

**Facility Operating License Nos. DPR-39 and DPR-48.** The amendments revised the Technical Specifications.

**Date of initial notice in Federal Register:** January 22, 1992 (57 FR 2590) By letters dated February 6, March 13, and April 3, 1992, CECo provided additional clarifying information that did not change the initial proposed no significant hazards consideration. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 5, 1992. No significant hazards consideration comments received: No

**Local Public Document Room**

**location:** Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

**Commonwealth Edison Company, Docket Nos. 50-295 and 50-304, Zion Nuclear Power Station, Units 1 and 2, Lake County, Illinois**

**Date of application for amendments:** December 26, 1991, as supplemented March 27, April 3, and April 10, 1992

**Brief description of amendments:** The amendments revise the Technical Specifications Definitions section to address the planned upgrade of the Process Protection System from the current Westinghouse 7100 series analog system to Westinghouse Eagle-21 digital system.

**Date of issuance:** June 9, 1992

**Effective date:** June 9, 1992

**Amendment Nos.:** 138 and 127

**Facility Operating License Nos. DPR-39 and DPR-48.** The amendments revised the Technical Specifications.

**Date of initial notice in Federal Register:** January 16, 1992 (57 FR 1930) The March 27, April 3, and April 10, 1992, supplements provided additional clarifying information that did not change the initial proposed no significant hazards consideration. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 9, 1992. No significant hazards consideration comments received: No

**Local Public Document Room**

**location:** Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

**Connecticut Yankee Atomic Power Company, Docket No. 50-213, Haddam Neck Plant, Middlesex County, Connecticut**

**Date of application for amendment:** March 27, 1992

**Brief description of amendment:** The amendment adds a statement to the Technical Specification Table 2.2-1 to clarify the requirements for the reactor coolant flow-low trip setpoints. The change adds a footnote that states that the nominal flow per loop is equal to 61,500 gpm for four loops operating and 64,667 gpm for three loops operating.

**Date of issuance:** June 1, 1992

**Effective date:** June 1, 1992

**Amendment No.:** 152

**Facility Operating License No. DPR-61.** Amendment revised the Technical Specifications.

**Date of initial notice in Federal Register:** April 29, 1992 (57 FR 18172) The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No

**Local Public Document Room**

**location:** Russell Library, 123 Broad Street, Middletown, Connecticut 06457.

**Detroit Edison Company, Docket No. 50-341, Fermi-2, Monroe County, Michigan**

**Date of application for amendment:** November 26, 1991

**Brief description of amendment:** The proposed amendment relocates the existing procedural details of the current Radiological Effluent Technical Specifications (RETS) to the Offsite Dose Calculation Manual (ODCM), and procedural details for the solid radioactive wastes to the Process Control Program (PCP). The amendment also incorporates the respective programmatic controls into the



Administrative Controls section of the TS.

*Date of issuance:* June 9, 1992

*Effective date:* June 9, 1992

*Amendment No.:* 82

*Facility Operating License No.* NPF-43. The amendment revises the Technical Specifications

*Date of initial notice in Federal Register:* December 26, 1991 (56 FR 66918) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 9, 1992. No significant hazards consideration comments received: No.

*Local Public Document Room location:* Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161.

**Duke Power Company, Docket Nos. 50-369 and 50-370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina**

*Date of application for amendments:* January 8, 1992, as supplemented February 13, 1992

*Brief description of amendments:* The amendments revise the Administrative Controls section of the McGuire Nuclear Station, Units 1 and 2 Technical Specifications to reflect a reorganization of Duke Power Company (DPC) and changes to the DPC Quality Assurance Report. The reorganization decentralizes the DPC corporate management of nuclear activities and relocates these resources to each of the DPC nuclear stations, including the McGuire Nuclear Station.

*Date of issuance:* June 2, 1992

*Effective date:* June 2, 1992

*Amendment Nos.:* 132 and 114

*Facility Operating License Nos.* NPF-9 and NPF-17: Amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* March 4, 1992 (57 FR 7809) The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 2, 1992. No significant hazards consideration comments received: No.

*Local Public Document Room location:* Atkins Library, University of North Carolina, Charlotte (UNCC Station), North Carolina 28223

**Duke Power Company, Docket Nos. 50-369 and 50-370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina**

*Date of application for amendments:* February 5, 1992

*Brief description of amendments:* The amendments revise the wording in Technical Specification Surveillance Requirements 4.7.7.1a.(2) and 4.7.7.1b. to correct an error regarding the

acceptance criteria for methyl iodide penetration.

*Date of issuance:* June 11, 1992

*Effective date:* June 11, 1992

*Amendment Nos.:* 133 and 115

*Facility Operating License Nos.* NPF-9 and NPF-17: Amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* April 15, 1992 (57 FR 13129) The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 11, 1992. No significant hazards consideration comments received: No.

*Local Public Document Room location:* Atkins Library, University of North Carolina, Charlotte (UNCC Station), North Carolina 28223

**Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Mississippi Power & Light Company, Docket No. 50-416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi**

*Date of application for amendment:* May 8, 1992, as supplemented May 15, 1992

*Brief description of amendment:* The amendment increases the trip setpoints of four circuit breakers for the Suppression Pool Makeup Valves.

*Date of issuance:* June 1, 1992

*Effective date:* June 1, 1992

*Amendment No.:* 100

*Facility Operating License No.* NPF-29. Amendment revises the Technical Specifications. Public comments requested as to proposed no significant hazards consideration: Yes (57 FR 20533 dated May 13, 1992). That notice provided an opportunity to submit comments on the Commission's proposed no significant hazards consideration determination. No comments have been received. The notice also provided for an opportunity to request a hearing by May 28, 1992, but indicated that if the Commission makes a final no significant hazards consideration determination any such hearing would take place after issuance of the amendment. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No

*Local Public Document Room location:* Judge George W. Armstrong Library, Post Office Box 1406, S. Commerce at Washington, Natchez, Mississippi 39120.

**GPU Nuclear Corporation, Docket No. 50-320, Three Mile Island Nuclear Station, Unit No. 2, (TMI-2), Dauphin County, Pennsylvania**

*Date of application for amendment:* October 10, 1989

*Brief description of amendment:* The amendment modifies Appendix B Technical Specifications by deleting the requirement to sample for Strontium-89 in both liquid and gaseous radioactive wastes.

*Date of issuance:* June 5, 1992

*Effective date:* June 5, 1992

*Amendment No.:* 42

*Facility Operating License No.* DPR-73. Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* April 29, 1992 (57 FR 18174) The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated June 5, 1992. No significant hazards consideration comments received: No

*Local Public Document Room location:* Government Publications Section, State Library of Pennsylvania, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

**Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas**

*Date of amendment request:* October 30, 1991

*Brief description of amendments:* The amendments revise various UFSAR sections based upon the revision of radiological consequences which result from changes to radionuclide inventories associated with extending fuel burnups. The changes reflect revised dose estimates but remain well below those limits associated with the environmental qualification of equipment and the maximum radiation exposure to the public or plant personnel. These amendments are being issued pursuant to the requirements of 10 CFR 50.59(c) because the review by Houston Lighting and Power Company identified the changes as an unreviewed safety question. No changes to the Technical Specifications are required by these amendments.

*Date of issuance:* June 8, 1992

*Effective date:* June 8, 1992

*Amendment Nos.:* Amendment No. 38 and Amendment No. 29



**Facility Operating License Nos. NPF-76 and NPF-80:** Amendment revised the Updated Final Safety Analysis Report.

**Date of initial notice in Federal Register:** March 4, 1992 (57 FR 7812) The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 8, 1992. No significant hazards consideration comments received: No

**Local Public Document Room location:** Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488

**Northeast Nuclear Energy Company, et al., Docket No. 50-336,** Millstone Nuclear Power Station, Unit No. 2, New London County, Connecticut

**Date of application for amendment:** April 18, 1992, as supplemented May 7, 1992.

**Brief description of amendment:** The amendment changes the Millstone Unit No. 2 Technical Specifications by modifying the existing two region spent fuel pool design, modified by Amendment 109, dated January 15, 1986, and Amendment 128, dated March 31, 1988, to a three region configuration.

**Date of issuance:** June 4, 1992

**Effective date:** June 4, 1992

**Amendment No.:** 158

**Facility Operating License No. DPR-65:** Amendment revised the Technical Specifications.

**Date of initial notice in Federal Register:** April 28, 1992 (57 FR 17934) The May 7, 1992, submittal provided additional information that did not change the initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment and final no significant hazards consideration determination is contained in a Safety Evaluation dated June 4, 1992. No significant hazards consideration comments received: Yes. Comments and requests for a hearing were received from Ms. Patricia R. Nowicki of South Windsor, Connecticut, representing Earthvision, Inc., and Ms. Mary Ellen Marucci of New Haven, Connecticut. A telephone call was received from Mr. Michael Pray of New London, Connecticut, on May 28, 1992, indicating he would file a request for a hearing.

**Local Public Document Room location:** Learning Resources Center, Thames Valley State Technical College, 574 New London Turnpike, Norwich, Connecticut 06360.

**Portland General Electric Company, et al., Docket No. 50-344,** Trojan Nuclear Plant, Columbia County, Oregon

**Date of application for amendment:** November 30, 1989, superseded by letter dated June 28, 1991, and supplemented by letter dated March 27, 1992

**Brief description of amendment:** This amendment revises several Trojan Technical Specifications (TTS) including TTS Sections 3.0 and 4.0, and associated Bases, in accordance with the guidance contained in the Generic Letter 87-09, "Sections 3.0 and 4.0 of the Standard Technical Specifications (STS) on the Applicability of Limiting Conditions for Operation and Surveillance Requirements." This is a Technical Specification line-item improvement. In addition, TS 3.1.3.1, "Group Height," TS 3.1.3.3, "Rod Drop Time," TS Table 4.3-1 on Power Range Neutron Flux notations, and TS 4.7.1.2.1.c on Steam Drive Auxiliary Feedwater Pump surveillance, have been revised to accommodate administrative changes.

**Date of issuance:** June 1, 1992

**Effective date:** June 1, 1992

**Amendment No.:** 185

**Facility Operating License No. NPF-1:** The amendment revised the Technical Specifications.

**Date of initial notice in Federal Register:** December 28, 1991 (56 FR 66924) and April 29, 1992 (57 FR 18176). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No.

**Local Public Document Room location:** Branford Price Millar Library, Portland State University, 934 S.W. Harrison Street, P.O. Box 1151, Portland, Oregon 97207

**Portland General Electric Company, et al., Docket No. 50-344,** Trojan Nuclear Plant, Columbia County, Oregon

**Date of application for amendment:** April 1, 1992

**Brief description of amendment:** This amendment revises TS 3/4 6.1.3, "Containment Air Locks," to provide for operational flexibility and conform to NUREG 0452, Revision 4, "Standard Technical Specifications for Westinghouse Pressurized Water Reactors."

**Date of issuance:** June 1, 1992

**Effective date:** June 1, 1992

**Amendment No.:** 186

**Facility Operating License No. NPF-1:** The amendment revised the Technical Specifications.

**Date of initial notice in Federal Register:** April 29, 1992 (57 FR 18178) The Commission's related evaluation of

the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No.

**Local Public Document Room location:** Branford Price Millar Library, Portland State University, 934 S.W. Harrison Street, P.O. Box 1151, Portland, Oregon 97207

**Power Authority of The State of New York, Docket No. 50-286,** Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

**Date of application for amendment:** December 20, 1991, as supplemented January 14, 1992.

**Brief description of amendment:** The amendment revised Technical Specifications Section 3.2 (Chemical and Volume Control System), Section 3.3.A (Safety Injection and Residual Heat Removal Systems), and Section 3.3.B (Containment Cooling and Iodine Removal Systems). These sections were revised to provide for an increased boron concentration in the refueling water storage tank and related changes. These changes were necessary to support the use of higher enriched cores that are needed for the Indian Point Nuclear Generating Station Unit No. 3 to operate on a 24-month cycle.

**Date of issuance:** June 2, 1992

**Effective date:** June 2, 1992

**Amendment No.:** 119

**Facility Operating License No. DPR-64:** Amendment revised the Technical Specifications.

**Date of initial notice in Federal Register:** February 19, 1992 (57 FR 6039) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 2, 1992. No significant hazards consideration comments received: No

**Local Public Document Room location:** White Plains Public Library, 100 Martine Avenue, White Plains, New York 10610.

**Public Service Company of Colorado, Docket No. 50-267,** Fort St. Vrain Nuclear Generating Station, Platteville, Colorado

**Date of amendment request:** December 24, 1991 as supplemented April 14, 1992.

**Brief description of amendment:** This amendment allows a reduction in TS requirements consistent with present status of FSV and all nuclear fuel being removed from the reactor protected area.

**Date of issuance:** June 5, 1992

**Effective date:** June 5, 1992

**Amendment No.:**



T3Facility License No. DPR-34: Amendment revises the license.  
*Date of initial notice in Federal Register:* February 5, 1992 (57 FR 4494)  
 The Commission's related safety evaluation of the amendment is contained in a safety evaluation dated June 5, 1992. No significant hazards consideration comments received: None  
*Local Public Document Room Location:* Greeley Public Library, City Complex Building, Greeley, Colorado 80631.

**Public Service Electric & Gas Company,**  
**Docket No. 50-354, Hope Creek**  
**Generating Station, Salem County, New**  
**Jersey**

*Date of application for amendment:* July 25, 1991, as supplemented May 11, 1992

*Brief description of amendment:* This amendment revised Technical Specifications sections 4.0.5, APPLICABILITY, 3.4.3.1, LEAKAGE DETECTION SYSTEMS; 3/4.4.3.2 OPERATIONAL LEAKAGE, and the associated BASES, to conform to the NRC staff positions stated in Generic Letter 88-01.

*Date of issuance:* As of the date of issuance and shall be implemented within 60 days of the date of issuance.

*Effective date:* June 1, 1992

*Amendment No.:* 51

*Facility Operating License No. NPF-57:* This amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* September 4, 1992 (56 FR 43612) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No  
*Local Public Document Room location:* Pennsville Public Library, 190 S. Broadway, Pennsville, New Jersey 08070

**Public Service Electric & Gas Company,**  
**Docket No. 50-354, Hope Creek**  
**Generating Station, Salem County, New**  
**Jersey**

*Date of application for amendment:* January 24, 1990 and supplemented on April 27, 1990, December 4, 1990, September 10, 1991 and December 10, 1991. The supplemental letters did not affect the original no significant hazards determination.

*Brief description of amendment:* The amendment request revised the Radiation Protection and Radiological Environmental Monitoring Technical Specifications and changed the organization and responsibilities of the Nuclear Safety Review Department and the Station Operations Review Committee.

*Date of issuance:* June 8, 1992  
*Effective date:* As of the date of issuance and shall be implemented within 90 days of the date of issuance.  
*Amendment No.:* 52  
*Facility Operating License No. NPF-57:* This amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* February 21, 1990 (55 FR 6116)  
 The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 8, 1992. No significant hazards consideration comments received: No  
*Local Public Document Room location:* Pennsville Public Library, 190 S. Broadway, Pennsville, New Jersey 08070

**Public Service Electric & Gas Company,**  
**Docket Nos. 50-272 and 50-311, Salem**  
**Nuclear Generating Station, Unit Nos. 1**  
**and 2, Salem County, New Jersey**

*Date of application for amendments:* July 7, 1989, superseded by letters dated May 18 and 31, 1990 and revised by supplements dated November 9, 1990, September 10, 1991, December 10, 1991, and April 20, 1992.

*Brief description of amendments:* These amendments incorporated the reporting requirements of Generic Letter 83-43, the primary coolant specific activity reporting requirements of GL 85-19, organizational changes into the technical specifications and provided editorial corrections to the technical specifications.

*Date of issuance:* June 8, 1992  
*Effective date:* June 8, 1992  
*Amendment Nos. 133 and 112*  
*Facility Operating License Nos. DPR-70 and DPR-75:* These amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 17, 1990 (55 FR 42097)  
 The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated June 8, 1992. No significant hazards consideration comments received: No  
*Local Public Document Room location:* Salem Free Public Library, 112 West Broadway, Salem, New Jersey 08079

**Texas Utilities Electric Company,**  
**Docket No. 50-445, Comanche Peak**  
**Steam Electric Station, Unit No. 1,**  
**Somervell County, Texas**

*Date of amendment request:* February 28, 1992, as supplemented by letters dated April 6, 1992 and May 26, 1992.

*Brief description of amendment:* The amendment changes the Technical Specifications by deleting the requirements for the Boron Dilution Mitigation System (BDMS).

*Date of issuance:* June 8, 1992  
*Effective date:* June 8, 1992 to be implemented within 30 days of issuance.  
*Amendment No.:* Amendment No. 10  
*Facility Operating License No. NPF-87:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* March 13, 1992 (57 FR 8941)  
 The April 6, 1992, and May 26, 1992 letters provided supplemental information and did not change the initial no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 8, 1992. No significant hazards consideration comments received: No

*Local Public Document Room location:* University of Texas at Arlington Library, Government Publications/Maps, 701 South Cooper, P. O. Box 19497, Arlington, Texas 76019.

**The Cleveland Electric Illuminating**  
**Company, Centerior Service Company,**  
**Duquesne Light Company, Ohio Edison**  
**Company, Pennsylvania Power**  
**Company, Toledo Edison Company,**  
**Docket No. 50-440, Perry Nuclear Power**  
**Plant, Unit No. 1, Lake County, Ohio**

*Date of application for amendment:* February 8, 1988, as supplemented March 14, 1990.

*Brief description of amendment:* This amendment revises Technical Specification (TS) Table 3.3.2-2 by changing the Residual Heat Removal/Reactor Core Isolation Cooling System Steam Line Flow-High Trip Setpoint and Allowable Value based on startup test results, and deletes a footnote referring to setpoint adjustments found during the startup test program.

*Date of issuance:* May 28, 1992  
*Effective date:* May 28, 1992  
*Amendment No. 43*

*Facility Operating License No. NPF-58:* This amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* May 4, 1988 (53 FR 15917) The March 14, 1990 submittal provided clarifying information only. It did not change the original proposed determination of no significant hazards consideration. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 28, 1992. No significant hazards consideration comments received: No

*Local Public Document Room location:* Perry Public Library, 3753 Main Street, Perry, Ohio 44081



Virginia Electric and Power Company, et al., Docket No. 50-338, North Anna Power Station, Unit No. 1, Louisa County, Virginia

*Date of application for amendment:* January 20, 1992

*Brief description of amendment:* This amendment adds a license condition which allows a one-time extension of specific surveillance requirements for NA-1 cycle 9 to coincide with the steam generator replacement program/refueling outage currently scheduled to commence in January 1993. In addition, license conditions 2.D.(3)s and 2.D.(3)t have been deleted.

*Date of issuance:* June 1, 1992

*Effective date:* June 1, 1992

*Amendment No.:* 162

*Facility Operating License No.* NPF-4: Amendment revised the license.

*Date of initial notice in Federal Register:* April 29, 1992 (57 FR 18179) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No.

*Local Public Document Room location:* The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903-2498.

Virginia Electric and Power Company, Docket Nos. 50-280 and 50-281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia.

*Date of application for amendments:* November 7, 1991

*Brief description of amendments:* These amendments remove statements addressing previous operator training programs to reflect the fact that the current training programs have been accredited and certified in accordance with the criteria of Regulatory Guide 1.8, Revision 2, "Qualification and Training of Personnel for Nuclear Power Plants."

*Date of issuance:* June 1, 1992

*Effective date:* June 1, 1992

*Amendment Nos.* 169, 168

*Facility Operating License Nos.* DPR-32 and DPR-37: Amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* February 5, 1992 (57 FR 4495) The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No

*Local Public Document Room location:* Swem Library, College of William and Mary, Williamsburg, Virginia 23185

Virginia Electric and Power Company, Docket Nos. 50-280 and 50-281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia.

*Date of application for amendments:* July 8, 1991, as supplemented April 15, 1992

*Brief description of amendments:* These amendments increase the F delta H surveillance limit from a value of 1.55 to 1.56 and provide changes for implementation of the statistical DNBR evaluation methodology.

*Date of issuance:* June 1, 1992

*Effective date:* June 1, 1992

*Amendment Nos.* 170, 169

*Facility Operating License Nos.* DPR-32 and DPR-37:

Amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* September 18, 1991 (56 FR 47246). The April 15, 1992 letter provided supplemental information which did not change the staff's initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 1, 1992. No significant hazards consideration comments received: No

*Local Public Document Room location:* Swem Library, College of William and Mary, Williamsburg, Virginia 23185

**Notice of Issuance of Amendment to Facility Operating License and Final Determination of No Significant Hazards Consideration and Opportunity for Hearing (Exigent or Emergency Circumstances)**

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual 30-day Notice of Consideration of Issuance of Amendment and Proposed No Significant Hazards Consideration Determination and Opportunity for a Hearing. For exigent circumstances, the Commission has either issued a Federal

Register notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has



made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document room for the particular facility involved.

A copy of items (2) and (3) may be obtained upon request addressed to the U. S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects.

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. By July 24, 1992, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room for the particular facility involved. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in

the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

A request for a hearing or a petition for leave to intervene must be filed with

the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to (Project Director): petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket Nos. 50-498 and 50-499, South Texas Project, Units 1 and 2, Matagorda County, Texas

*Date of amendment request:* May 20, 1992

*Brief description of amendments:* The amendments change the Technical Specifications by adding a footnote to Note 14 of Table 4.3-1 which states that the complete verification of the operability of the shunt trip relay circuitry shall be implemented for each unit prior to the affected unit's startup from the first planned or unplanned shutdown occurring after May 19, 1992. The change was required due to the discovery that the existing surveillance procedure does not adequately verify the operability of the shunt trip contacts associated with the manual reactor trip function.

*Date of issuance:* June 2, 1992

*Effective date:* June 2, 1992

*Amendment Nos.:* Amendment Nos. 37 and 28



*Facility Operating License Nos. NPF-76 and NPF-80. Amendments revised the Technical Specifications. Public comments requested as to proposed no significant hazards consideration comments received: No. The Commission's related evaluation of the amendments, finding of emergency circumstances, and final determination of no significant hazards consideration are contained in a Safety Evaluation dated June 2, 1992.*

*Local Public Document Room location: Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488.*

*Dated at Rockville, Maryland, this 17th day of June 1992.*

*For the Nuclear Regulatory Commission  
Bruce A. Boger,*

*Director, Division of Reactor Projects III/IV/  
V, Office of Nuclear Reactor Regulation  
[Doc. 92-14754 Filed 6-23-92; 8:45 am]*

**BILLING CODE 7590-01-F**

**[Docket Nos. 50-390 and 50-391]**

**Tennessee Valley Authority;  
Availability of Safety Evaluation  
Report Related to the Operation of  
Watts Bar Nuclear Plant, Units 1 and 2**

The U.S. Nuclear Regulatory Commission has published the Safety Evaluation Report, Supplement 9 (NUREG-0847, Supp. 9) related to the operation of Watts Bar Nuclear Plant, Units 1 and 2, Docket Nos. 50-390 and 50-391.

Copies of the report have been placed in the NRC's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and in the Local Public Document Room, Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402, for review by interested persons. Copies of the report may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013-7082. GPO deposit account holders may charge orders by calling 202-275-2060. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

*Dated at Rockville, Maryland this 16th day of June, 1992.*

*For the Nuclear Regulatory Commission.  
Frederick J. Hebdon,*

*Director, Project Directorate II-4, Division of  
Reactor Projects—I/II, Office of Nuclear  
Reactor Regulation.*

*[FR Doc. 92-14823 Filed 6-23-92; 8:45 am]*

**BILLING CODE 7590-01-M**

**[Docket No. 70-3070-ML; ASLBP No. 91-641-02-ML]**

**Atomic Safety and Licensing Board  
Before Administrative Judges: Morton  
B. Margulies, Chairman Richard F.  
Cole, Frederick J. Shon**

**Memorandum and Order—Ruling On  
Discovery Disputes Pertaining To  
Contentions B, H, I, J and K**

*In the matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center) and (Special Nuclear Materials License) June 18, 1992.*

The matters for decision before the Board are disputes relating to discovery between Applicant, Louisiana Energy Services, L.P. (LES), and Intervenor, Citizens Against Nuclear Trash (CANT), pertaining to Contentions B, H, I, J and K.<sup>1</sup>

CANT, on April 14, 1992, served on LES its first set of interrogatories and request for the production of documents relating to the specified contentions. LES responded on May 4, 1992, answering most of the interrogatories and objecting to others. Accompanying the response was an LES motion for a protective order.

In turn, on May 19, 1992, CANT filed a motion to compel LES to respond to discovery and objected to the LES motion for a protective order. On June 3, 1992, Applicant filed a response to the CANT motion.

In this Memorandum and Order the Board rules on the cross-motions.

**A. Disputes As To Proper Parties**

Applicant's first objection to the interrogatories is that in naming LES as a party, CANT in its definitions defined LES as being "Louisiana Energy Services, L.P. and all of its partners, employees, agents, or any other representatives." LES contends that as a Delaware Limited Partnership it is a distinct legal entity which is separate from its partners and it is the party required to answer and not the partners.

In its motion to compel Intervenor asserts that under 10 CFR 2.740(b)a interrogatories are to be "answered by the party served, or if the party served is a public or private corporation or a partnership or association, by an officer or agent, who shall furnish such information as is available to the party." Thus, the interrogatories "must be answered by the entity—LES or one of its partners, officers, or agents—who has knowledge of the subject of the interrogatory." It further argues that LES

<sup>1</sup> CANT incorrectly titled its pleadings as involving Contentions A, H, I, J and K. Contention A was never admitted but Contention B was and should be included.

must select the appropriate agent to answer the interrogatories, even if that agent is one of LES's partners, and that LES cannot avoid revealing information simply because that information is in the hands of one of its partners.

LES, in its response to compel, states that Intervenor misunderstands its position and that there is no dispute between the parties. It requests that portion of the motion should be withdrawn or denied.

LES agrees with Intervenor that if the information necessary to answer is not within Applicant's possession, but is within the body of knowledge possessed by LES' partners, Applicant will provide that information and will identify the partner providing the information and that if Applicant does not possess the information to answer a question it is incumbent on Applicant to inquire of the partners to determine if the answer is known. LES states it took issue with Intervenor's definition to clearly establish that Applicant need not provide an answer to each interrogatory for each general partner.

The Board does not believe the definition of LES that CANT used was ever intended to require Applicant to provide an answer to each interrogatory for each general partner. The dispute had its origin in the exercising of an abundance of caution. It has been rendered moot with the disputants understanding that LES has the responsibility for responding to the interrogatories and where it does not have the information directly it will obtain it from the partners if they possess it.

The Board denies that part of each motion dealing with the dispute over proper parties because of mootness.

**B. Dispute As To Individual  
Interrogatories**

Commission law governing discovery is well established. 10 CFR 2.740(a)(1) provides, in part, that discovery may be had of any matter, not privileged, which is relevant to the subject matter involved in the proceeding. It is not ground for objections that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In Commission practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, to refine the issues and to prepare adequately for a more expeditious hearing or trial. *Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981).*



When the information sought is irrelevant to the proceeding the interrogatories are objectionable and need not be answered. *Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977).

#### Interrogatories 2-9

Interrogatories 2 through 9 generally seek information about the byproduct stream and wastes that would be produced at Claiborne Enrichment Center (CEC). LES asserts that the inquiries are not relevant to the admitted contentions.

Contention B, which states that the LES decommissioning plan does not provide reasonable assurance that the CEC plant site can be adequately cleaned up and restored upon cessation of operations, was admitted insofar as it challenges the reasonableness of LES' decommissioning funding plan. The admission of the contention was premised on CANT's claims that Applicant does not have a realistic basis for its estimates, that depleted uranium is not a marketable resource but a waste product, that limited disposal sites will increase decommissioning costs, that the decommissioning costs do not indicate the extent of decontamination, and that there are other deficiencies in the cost estimates (Basis 1, 4 and 5).

Contention J, which deals with inadequate assessment of costs under NEPA, was admitted premised in part on the claim that there is an insufficient basis for the LES estimate of decommissioning costs (Basis J.3).

LES argues that the matters about which CANT seeks information in Interrogatories 2-9 (i.e., chemical composition, physical characteristics and isotopic makeup of depleted uranium, and their effects on decommissioning costs) are not related to any of the admitted contentions and are therefore irrelevant.

CANT states that the chemical composition and physical characteristics of a waste determine the manner in which it is handled and stored, thus affecting the cost of managing and disposing of the tails. It further asserts that the information regarding the types of wastes will assist in determining whether the estimates contained in the decommissioning plan are reasonable.

Citing Applicant's response to its interrogatories that "mixed wastes, if any, are generated in very small quantities and are to be properly disposed of \* \* \*," Intervenor argues that it is neither willing nor required to accept such a bold assertion in lieu of answers to specific interrogatories.

The Board finds that a complete identification of the product stream and wastes of a uranium enrichment facility can bear on the costs of their disposal and can provide a basis for determining the reasonableness of decommissioning costs and of a funding plan for decommissioning. Insofar as the interrogatories seek such information, they are relevant to Contentions B and J and are proper inquiries. Interrogatories 2-6 should be responded to by Applicant.

Interrogatories 7-9 should be considered separately because they deal with mixed wastes. The Board, in ruling on the admissibility of Contentions B and J, determined that uranium hexafluoride tails that would be produced in operating CEC are a source material and not a mixed waste under the Resource Conservation and Recovery Act (RCRA). It rejected CANT's claim to the contrary.

Interrogatory 7 references Table 4.5-1 of the Safety Analysis Report, Volume 3, for showing categories of CEC radioactive waste requiring offsite shipment and disposal.<sup>2</sup> The inquiry is whether the listed waste can be considered mixed waste.

The Board's ruling that uranium hexafluoride tails are not a mixed waste under RCRA is not a bar to the interrogatory because other wastes may be present and their identification may assist in determining the reasonableness of decommissioning plan estimates. Intervenor need not accept as final Applicant's assertion that the amount of mixed waste is small and will be disposed of during plant operation. It is within CANT's right to probe for specifics in determining the facts. LES should respond to Interrogatory 7.

Interrogatory 8 deals with chemical laboratory waste which is an organic solvent containing uranium. Inquiry is made of whether the organic solvent containing uranium is mixed waste and of the percentages of the uranium that will be extracted from the solvents. The inquiry is similarly relevant to the issues as Interrogatory 7 and LES should respond.

Interrogatory 9 seeks information on whether the "Clarification of RCRA Hazardous Waste Testing Requirements for Mixed Waste" (NRC Draft Guidance, March 1992) changes Applicant's answer to CANT's contention regarding the mixed waste issue. This interrogatory is improper because it seeks to resurrect an issue that the Board dismissed as supporting Contention B. Discovery may not be had

of a matter which is not relevant to the subject matter involved in the proceeding. LES need not respond to Interrogatory 9.

#### Interrogatories 28-30, 52

Contentions 28 through 30 deal with alleged offsite emergency planning inadequacies. Contention 52 inquires to what extent property values will be affected by the potential for CEC to become a storage facility for hazardous wastes and the perception of pollution and danger from the CEC.

LES states that the interrogatories are irrelevant to any of the admitted contentions. It asserts that Interrogatories 28, 29, and 30 are almost a direct quote of Intervenor's bases 13, 14, and 15, respectively, of Contention H, which were rejected by the Board. It also asserts as to Interrogatory 52, CANT sought to admit the very issue in basis 8 of Contention J, which was denied by the Board.

Contention H treats with emergency planning deficiencies and alleges that the CEC license application does not provide a reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the plant. Contention J alleges the inadequate assessment of costs under NEPA. The contention states that the Environmental Report does not adequately describe the environmental, social, and economic costs of operating the facility, that the benefit-cost analysis fails to demonstrate that there is a need for the facility, and that the costs far outweigh the benefits of the proposed action.

CANT acknowledges that Interrogatories 28-30 were rejected by the Board as individual bases but claims that all of the interrogatories are relevant because the Board has admitted basis 17 of Contention H, which challenges the adequacy of LES' measures for mitigation of onsite and offsite accident consequences.

As pointed out by LES, CANT is incorrect in its claim that the Board admitted basis 17 for onsite and offsite consequences. Basis 17 was only accepted as to onsite consequences. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 348 (1991). Intervenor's claim of relevancy was inadequately supported. LES need not respond to the interrogatories.

#### Interrogatories 52-57

The interrogatories seek information pertaining to the impact of the plant on property values and LES' site selection process as it relates to the CEC

<sup>2</sup> The table is contained in the Environmental Report rather than in the Safety Analysis Report.



community and communities at sites that were not selected.

Applicant asserts that the process by which it selected the Homer site and the evaluation of the impacts on communities at non-selected sites are not relevant. It claims that no nexus was shown between Applicant's decision to select the proposed site and the adequacy of the description of impacts in the Environmental Report.

Contention J alleges that the "Benefit-Cost Analysis" is slanted in favor of the benefits of the project and that it contains little discussion of the potentially significant impacts and their environmental and social costs. Basis J.5, which supports the contention, asserts that the proposed plant will have negative economic and sociological impacts on two minority communities and that the Environmental Report does not adequately reflect consideration of these impacts.

LES also asserts that Intervenor's inquiry as to property values was a matter raised as basis J.8 in support of Contention J, which was rejected by the Board.

Intervenor argues that the inquiries may lead to the discovery of admissible evidence relevant to Contention J. It also argues that consideration of property values is relevant to unequal effects on minority communities.

The Board finds Interrogatory 52 on property values relevant to CANT's claim that the proposed plant will have negative economic and sociological impacts. This finding is not contradictory to the Board's rejection of basis J.8 where CANT claimed, without support, that property values would decline. The basis was rejected as support for the contention because it was predicated on speculation. With the interrogatory Intervenor is now seeking information on the property values. LES should respond.

As to those interrogatories bearing on the site selection process, the LES site selection process resulted in choosing Homer, LA as the site for the facility. CANT alleges that the selection has resulted in negative impacts on the community. Considering the causal connection between the process and the selection it is not unreasonable to expect that inquiry about the process may lead to the discovery of admissible evidence relative to the alleged negative impacts and failure to adequately consider them in the Environmental Report.

The practice of liberally granting pretrial discovery supports this approach. A response to the interrogatories should also provide useful information on alternatives to the

proposed action. Responding to the interrogatories would not be burdensome on Applicant because the inquiries are about a process that the Applicant has employed in selecting the site.

#### Order

Based upon all of the foregoing it is hereby ordered that:

(a) Applicant's motion for a protective order, of May 4, 1992, is granted insofar as Interrogatories 9, 28, 29 and 30, and is otherwise denied; and

(b) Intervenor's motion to compel, of May 19, 1992, is granted insofar as Interrogatories 2, 3, 4, 5, 6, 7, 8, 52, 53, 54, 55, 56 and 57, and is otherwise denied.

The Atomic Safety and Licensing Board.

Morton B. Margulies,  
Chairman, Administrative Law Judge.

Bethesda, Maryland, June 18, 1992.

Richard F. Cole,  
Administrative Judge.

Frederick J. Shon,  
Administrative Judge.

[FR Doc. 92-14859 Filed 6-23-92; 6:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-327 and 50-328]

#### Tennessee Valley Authority; Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR-77 and DPR-79 issued to the Tennessee Valley Authority (the licensee) for operation of the Sequoyah Nuclear Plant, Units 1 and 2 located in Hamilton County, Tennessee.

The proposed amendment would increase the storage capacity of the spent fuel pool from its present 1386 storage cells to 2091 storage cells. This would be accomplished by replacing the present medium density fuel racks with 12 free-standing, self-supporting, high density rack modules constructed of stainless steel and a neutron absorber material (boron carbide and aluminum-composite sandwich, product name "boral"). The proposed change would extend the limit when full core discharge capacity is no longer available for one reactor from the present date of 1996 to 2003 or 2004.

In addition, the proposed amendment would add controls affecting the fuel arrangement and spacing of fuel in the spent fuel pool, revise related

surveillance requirements, address controls for fuel movement over the cask loading area of the spent fuel pool, revise the operability requirements of the crane interlocks and physical stops, address additional fuel storage capacity in the cask loading area, and incorporate other related information.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

TVA has evaluated the proposed technical specification (TS) changes and has determined that they do not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c).

Operation of Sequoyah in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated.

The following potential scenarios were considered:

1. A spent-fuel assembly drop.
2. Drop of the transfer canal gate or the divider gate in the spent-fuel pool.
3. A seismic event.
4. Loss of cooling flow in the spent-fuel pool.
5. Installation activities.

The effect of additional spent-fuel pool storage cells fully loaded with fuel on the first four potential accident scenarios listed above has been reviewed. It was concluded that after installation activities have been completed, the presence of additional fuel in the pool does not increase the probability of occurrence of these four events.

With regard to installation activities, the existing Sequoyah TSs prohibit loads in excess of 2100 pounds from travel over fuel assemblies in the storage pool and require the associated crane interlocks and physical stops be periodically demonstrated operable. During installation, racks and associated handling tools will be moved over the spent-fuel pool but movement over fuel will be prohibited. All installation work in the spent-fuel-pit area will be controlled and performed



in strict accordance with specific written procedures.

NRC regulations provide that, in lieu of providing a single failure-proof crane system, the control of heavy loads guidelines can be satisfied by establishing that the potential for a heavy load drop is extremely small. Storage rack movements to be accomplished with the Sequoyah auxiliary building crane will conform with NUREG-0612 guidelines, in that the probability of a drop of a storage rack is extremely small. The crane has a tested capacity of 80 tons. The maximum weight of any existing or replacement storage rack and its associated handling tool is less than 15 tons. Therefore, there is ample safety factor margin for movements of the storage racks by the auxiliary building crane. Special lifting devices, which have redundancy or a rated capacity sufficient to maintain adequate safety factors, will also be utilized in the movements of the storage racks. In accordance with NUREG-0612, Appendix B, the safety margin ensures that the probability of a load drop is extremely low.

Load travel over fuel stored in the cask loading area of the cask pit will be minimized and, in any case, will be prohibited unless an impact shield, which has been specifically designed for this purpose, is covering the area. Loads that are permitted when the shield is in place must meet analytically determined weight, travel height, and cross-sectional area criteria that preclude penetration of the shield. A TS has been proposed that incorporates the previously mentioned loan criteria.

A fuel movement and rack changeout sequence has been developed that illustrates that it will not be necessary to carry existing or new racks over fuel in the cask loading area or any region of the pool containing fuel. A lateral-free zone clearance from stored fuel shall be maintained. Accordingly, it is concluded that the proposed installation activities will not significantly increase the probability of a load-handling accident. The consequences of a load-handling accident are unaffected by the proposed installation activities.

The consequences of a spent-fuel assembly drop were evaluated, and it was determined that the racks will not be distorted such that they would not perform their safety function. The criticality acceptance criterion, Keff less than or equal to 0.95, is not violated, and the calculated doses are well within 10 CFR part 100 guidelines. Thus, the consequences of this type of accident are not changed from previously evaluated spent-fuel assembly drops that have been found acceptable by NRC.

The existing TSs permit the transfer-canal gate and the divider gate in the spent-fuel pool to travel over fuel assemblies in the spent-fuel pool. Analysis showed that this drop caused less damage to the new racks than the fuel assembly drop when it impacts the top of the rack. Rack damage is restricted to an area above the active fuel region.

The consequences of a seismic event have been evaluated. The new racks are designed and will be fabricated to meet the requirements of applicable portions of the NRC regulatory guides and published standards. Design margins have been

provided for rack tilting, deflection, and movement such that the racks do not impact each other or the spent-fuel-pit walls in the active fuel region during the postulated seismic events. The new free-standing racks are designed to maintain their integrity during and after a seismic event. The fuel assemblies also remain intact and therefore no criticality concerns exist.

The spent-fuel pool system is a passive system with the exception of the fuel pool cooling train and heating, ventilating, and air-conditioning (HVAC) equipment. Redundancies in the cooling train and HVAC hardware are not reduced by the planned fuel storage densification. The potential increased heat load resulting from any additional storage of spent fuel is well within the existing system cooling capacity. Therefore, the probability of occurrence [of a] malfunction of safety equipment leading to the loss of cooling flow in the spent-fuel pool is not significantly affected. Furthermore, the consequences of this type incident are not significantly increased from previously evaluated cooling system loss of flow malfunctions. Thermal-hydraulic scenarios assume the reracked pool is approximately 85 percent full with spent fuel assemblies. From this starting point, the remaining storage capacity is utilized by analyzing both normal back-to-back and unplanned full core offloads using conservative assumptions and previously established methods. Calculated values include maximum pool water bulk temperature, coincident maximum pool water local temperature, the maximum fuel cladding temperature, time-to-boil after loss of cooling paths, and the effect of flow blockage in a storage cell.

Although the proposed modification increases the pool heat load, results from the above analyses yield a maximum bulk temperature of approximately 180 degrees Fahrenheit which is below the bulk boiling temperature. Also, the maximum local water temperature is below nucleate boiling condition values. Associated results from corresponding loss of cooling evaluations give minimums of 3.4 hours before boiling begins and 30 hours before the pool water level drops to the minimum required for shielding spent fuel. This is sufficient time to begin utilization of available alternate sources of makeup cooling water. Also, the effect of the increased thermal loading on the pool structure was evaluated and determined to be acceptable.

(2) Create the possibility of a new or different kind of accident from any accident previously analyzed.

The proposed modification has been evaluated in accordance with the guidance of the NRC position paper entitled, "OT Position for Review and Acceptance of Spent-Fuel Storage and Handling Applications"; appropriate NRC regulatory guides; appropriate NRC standard review plans; and appropriate industry codes and standards. Proven analytical technology was used in designing the planned fuel storage expansion and will be utilized in the installation process. Basic reracking technology has been developed and demonstrated in over 80 applications for fuel pool capacity increases that have already received NRC staff approval.

The TSs for the existing spent-fuel storage racks use burnup credit and fuel assembly administrative placement restrictions for criticality control. The change to three-zone storage in the spent-fuel pool is described in the proposed change to the design features section of the TSs. Additional evaluations were required to ensure that the criticality criterion is maintained. These include the evaluation for the limiting criticality condition, i.e., the abnormal placement of an unirradiated (fresh) fuel assembly of 4.95 weight percent enrichment into a storage cell location for irradiated fuel meeting the highest rack design burnup criterion. The evaluation for this case shows that the reactivity would exceed the limit in the absence of soluble boron. Soluble boron, for which credit is permitted under these abnormal conditions, ensures that reactivity is maintained substantially less than the design requirement. Calculations indicate that a soluble poison concentration of 685 parts per million (ppm) boron would be required to limit the maximum reactivity to a Keff of 0.95, including uncertainties. This is less than the existing and proposed TS requirements of 2000 ppm.

It is not physically possible to install a fuel assembly outside and adjacent to a storage module in the spent-fuel storage pool. However, for a storage module installed in the cask loading area of the cask pit, there would be sufficient room for such an extraneous assembly. The module in this area is administratively limited by the proposed TS change to spent fuel only, and calculations show that the maximum Keff remains well below the 0.95 limit under this postulated accident condition, even in the absence of soluble boron. To provide reactivity control assurance for the abnormal placement of a fresh assembly in the cask loading area module, a modification to the existing TS has been proposed that requires boron concentration measurements while handling fuel in that area.

Although these changes required addressing additional aspects of a previously analyzed accident, the possibility of a previously unanalyzed accident is not created. It is therefore concluded that the proposed reracking does not create the possibility of a new or different kind of accident from any previously analyzed.

(3) Involve a significant reduction in a margin of safety.

The design and technical review process applied to the reracking modification included addressing the following areas:

1. Nuclear criticality considerations.
2. Thermal-hydraulic considerations.
3. Mechanical, material, and structural considerations.

The established acceptance criterion for criticality is that the neutron multiplication factor shall be less than or equal to 0.95, including all uncertainties. The results of the criticality analysis for the new rack design demonstrate that this criterion is satisfied. The methods used in the criticality analysis conform to the applicable portions of NRC guidance and industry codes, standards and specifications. In meeting the acceptance criteria for criticality in the spent-fuel pool



and the cask loading area, such that Keff is always less than 0.95 at a 95/95 percent probability tolerance level, the proposed amendment does not involve a significant reduction in the margin of safety for nuclear criticality.

Conservative methods and assumptions were used to calculate the maximum fuel temperature and the increase in temperature of the water in the spent-fuel-pit area. The thermal-hydraulic evaluation used methods previously employed. The proposed storage modification will increase the heat load in the spent-fuel pool, but the evaluation shows that the existing spent-fuel cooling system will maintain the bulk pool water temperature at or below 180 degrees Fahrenheit. Thus it is demonstrated that the worst-case peak value of the pool bulk temperature is considerably lower than the bulk boiling temperature. Evaluation also shows that maximum local water temperatures along the hottest fuel assembly are below the nucleate boiling condition value. Thus there is no significant reduction in the margin of safety for thermal hydraulic or spent-fuel cooling considerations.

The mechanical, material, and structural design of the new spent-fuel racks is in accordance with applicable portions of "NRC OT Position for Review and Acceptance of Spent-Fuel Storage and Handling Applications," dated April 14, 1978 (as modified January 18, 1979), as well as other applicable NRC guidance and industry codes. The primary safety function of the spent-fuel racks is to maintain the fuel assemblies in a safe configuration through all normal and abnormal loading conditions. Abnormal loadings that have been evaluated with acceptable results and discussed previously include the effect of an earthquake and the impact because of the drop of a fuel assembly. The rack materials used are compatible with the fuel assemblies and the environment in the spent-fuel pool. The structural design for the new racks provides tilting, deflection, and movement margins such that the racks do not impact each other or the spent-fuel-pit walls in the active fuel region during the postulated seismic events. Also the spent-fuel assemblies themselves remain intact and no criticality concerns exist. In addition, finite element analysis methods were used to evaluate the continued structural acceptability of the spent-fuel pit. The analysis was performed in accordance with "Building Code Requirements for Reinforced Concrete" (ACI 318-63.77). Therefore, with respect to mechanical, material, and structural considerations, there is no significant reduction in a margin of safety.

The NRC has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within thirty (30) days after the date of publication of this notice will be

considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Rules and Directives Review Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to room P-223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By July 24, 1992, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at the Chattanooga-Hamilton County Library, 1101 Broad Street, Chattanooga, Tennessee 37402. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the

following factors: (1) the nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The



final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Frederick J. Hebdon: Petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11H, Knoxville, Tennessee 37902.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

The Commission hereby provides notice that this is a proceeding on an application for a license amendment falling within the scope of section 134 of the Nuclear Waste Policy Act of 1982 (NWSA), 42 U.S.C. 10154. Under section 134 of the NWSA, the Commission, at the request of any party to the proceeding must use hybrid hearing procedures with respect to "any matter which the Commission determines to be in controversy among the parties." The hybrid procedures in section 134 provide for oral argument on matters in controversy, preceded by discovery under the Commission's rules, and the designation, following argument, of only those factual issues that involve a genuine and substantial dispute, together with any remaining questions of law, to be resolved in an adjudicatory hearing. Actual adjudicatory hearings are to be held on those issues found to meet the criteria of section 134 and set for hearing after oral argument.

The Commission's rules implementing section 134 of the NWSA are found in 10 CFR part 2, subpart K, "Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors" (published at 50 FR 41670, October 15, 1985) to 10 CFR 2.1101 *et seq.* Under those rules, any party to the proceeding may invoke the hybrid hearing procedures by filing with the presiding officer a written request for oral argument under 10 CFR 2.1109. To be timely, the request must be filed within 10 days of an order granting a request for hearing or petition to intervene. (As outlined above, the Commission's rules in 10 CFR part 2, subpart G, and 2.714 in particular, continue to govern the filing of requests for a hearing or petitions to intervene, as well as the admission of contentions.) The presiding officer shall grant a timely request for oral argument. The presiding officer may grant untimely request for oral argument only upon showing of good cause by the requesting party for the failure to file on time and after providing the other parties an opportunity to respond to the untimely request. If the presiding officer grants a request for oral argument, any hearing held on the application shall be

conducted in accordance with hybrid hearing procedures. In essence, those procedures limit the time available for discovery and require that an oral argument be held to determine whether any contentions must be resolved in adjudicatory hearing. If no party to the proceedings requests oral argument, or if all untimely requests for oral argument are denied, then the usual procedures in 10 CFR part 2, subpart G, apply.

For further details with respect to this action, see the application for amendment dated March 27, 1992, and revisions to this submittal dated May 11, 1992 and May 28, 1992, which are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at the Chattanooga-Hamilton County Library, 1101 Broad Street, Chattanooga, Tennessee 37402.

Dated at Rockville, Maryland, this 17th day of June.

For the Nuclear Regulatory Commission.

David E. LaBarge,

Senior Project Manager, Project Directorate II-4, Division of Reactor Projects-1/II, Office of Nuclear Reactor Regulation.

[FR Doc. 92-14822 Filed 6-23-92; 8:45 am]

BILLING CODE 7590-01-M

## PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES

### Notice of Meeting

**SUMMARY:** The Presidential Commission on the Assignment of Women in the Armed Forces will hear testimony June 24 thru 27; presentations will be made by congressional members, advocacy groups, military services and civilians on policies pertaining to the Assignment of Women in the Military. Additionally, each of the Commission's four Fact Finding Panels will meet to discuss a commission poll of American attitudes about women in the Armed Forces.

### DATES:

7:30 am to 10 pm/Thursday, June 25th, Fact Finding Panels Meetings (Rooms to be announced), The Omni Shoreman, 2500 Calvert St., NW., Washington, DC.  
11 am to 6 pm/Thursday, June 25th, Dirksen Senate Office Building/Room 562 1st. & Constitution, NE, Washington, DC.  
Friday, June 26th & Saturday, June 27th, The Omni Shoreman, 2500 Calvert St., NW. Washington, DC. The Blue Room



8 am to 6 pm (Friday) 8 am to 1 pm (Saturday)

**Note:** In addition, The Presidential Commission on the Assignment of Women in the Armed Forces has scheduled the following regional hearings: Chicago, July 13, 14, & 15; Los Angeles, August 6, 7, & 8; Dallas, August 27, 28, & 29.

**STATUS:** Open to Public.

**CONTACT:** For more information contact: Magee Whelan or Kevin K. Kirk, (202) 376-6905.

The Presidential Commission on the Assignment of Women in the Armed Forces was established by Congress in the National Defense Authorization Act of 1992 (Pub. L. 102-190). The 15-member commission shall assess the laws and policies governing the assignment of women in the military and shall make recommendations on such matters to the President by November 15, 1992.

W.S. Orr,  
Staff Director.

[FR Doc. 92-14840 Filed 6-23-92; 8:45 am]

BILLING CODE 6820-CD-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-30830; File No. SR-Amex-91-22]

### Self-Regulatory Organizations; American Stock Exchange, Inc.; Order Approving Proposed Rule Change, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change, Relating to Listing Options on the Amex Pharmaceutical Index and on a Reduced Value Pharmaceutical Index.

Dated: June 18, 1992.

#### I. Introduction

On September 18, 1991, the American Stock Exchange, Inc. ("Amex" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to provide for the listing and trading of index options on the Amex Pharmaceutical Index ("Pharmaceutical Index" or "Index").

The proposed rule change was published for comment in Securities Exchange Act Release No. 29840 (October 18, 1991), 56 FR 55700 (October 29, 1991). No comments were received on the proposed rule change. The Amex amended the proposed rule change on

May 4, 1992.<sup>3</sup> This order approves the proposed rule change.

## II. Description of Proposal

### A. General

The Amex proposes to trade options on the Pharmaceutical Index, a new stock index developed by the Amex based on pharmaceutical industry stocks or American Depositary Receipts thereon ("ADRs") which are traded on the Amex,<sup>4</sup> the New York Stock Exchange (the "NYSE"), or are national market system securities traded through the facilities of the National Association of Securities Dealers Automated Quotation system ("NASDAQ-NMS").<sup>5</sup> The Amex also proposes to list long-term options on the full value Index and long-term options on a reduced-value Index that will be computed at one-tenth of the value of the Pharmaceutical Index. Long-term options based on the Index, which are known as LEAPS, will trade independent of and in addition to regular Pharmaceutical Index options traded on the Exchanges.<sup>6</sup>

### B. Composition of the Index

The Index is a capitalization-weighted index<sup>7</sup> that contains securities of the

<sup>3</sup> The Amex submitted Amendment No. 1 to the filing on May 4, 1992. This amendment modified the Amex's proposal in three ways. First, the proposal was amended to provide that at least 90% of the Index's numerical index value must be accounted for by stocks that meet the current options listing standards. Second, the proposal was amended to provide that the Amex must submit a rule filing with the Commission pursuant to section 19(b) of the Act if the Exchange determines to increase or decrease the number of stocks in the Index to greater than 20 or less than 10. Finally, the proposal was amended to provide for the listing of long-term reduced value Index options that will be computed at one-tenth the value of the Pharmaceutical Index. Additionally, on January 13, 1992, the Exchange sent a letter to the Commission providing additional information regarding the maintenance of the Index and the Index's constituent stocks. See letter from Claire P. McGrath, Senior Counsel, Amex, to Howard L. Kramer, Assistant Director, Division of Market Regulation ("Division"), SEC, dated January 13, 1992 ("January 1992 letter"). Finally, the Exchange sent a letter to the Commission providing that the expiring Index options contracts will be settled based on the opening prices of all the Index's component securities. See letter from Claire P. McGrath, Senior Counsel, Amex, to Thomas Gira, Branch Chief, Options Regulation, Division, SEC, dated January 14, 1992.

<sup>4</sup> But see note 11 *infra* and accompanying text.

<sup>5</sup> Currently, the NYSE is the primary exchange for all the stocks and ADRs that comprise the Index.

<sup>6</sup> LEAPS is an acronym for Long-Term Equity Anticipation Securities.

<sup>7</sup> A capitalization-weighted index is one in which an issue's relative weight in the total index value is determined by its total capitalization, as determined by multiplying the issuer's price per share times the number of shares outstanding.

most highly-capitalized companies in the pharmaceutical industry whose primary business is the manufacture of prescription and non-prescription drugs, and other related health products. Currently, the Index is based on 15 stocks.<sup>8</sup>

The Index is composed of stocks that on December 12, 1991, ranged in capitalization from \$8 billion to \$57 billion. The average daily closing prices of the stocks over the prior six months ranged from \$131.25 to \$24.25. The median and average capitalization of the component stocks were \$22.4 billion and \$19.45 billion, respectively. Under the proposed capitalization-weighted method for calculating the Index, as of December 12, 1991, the highest weighted stock accounted for 16.48% of the Index and the lowest weighted stock accounted for 2.32% of the Index.<sup>9</sup>

### C. Maintenance

The Amex will calculate and maintain the Index, and, pursuant to Exchange Rule 901C(b), may at any time or from time to time substitute stocks or adjust the number of stocks included in the Index, based on changing conditions in the pharmaceutical industry. If, however, the Exchange determines to increase the number of Index component stocks to greater than 20 or reduce the number of component stocks to fewer than 10, the proposal provides that the Amex will submit a rule filing with the Commission pursuant to section 19(b) of the Act.<sup>10</sup> In selecting securities to be included in the Index, the Exchange will be guided by a number of factors including the market value of outstanding shares and trading activity. The eligibility standards for the stocks in the Index are described in section D below.

<sup>8</sup> The Exchange has determined that there are presently fifteen component stocks appropriate for inclusion in the Pharmaceutical Index. It is the Exchange's current intention to maintain the number of component stocks at approximately fifteen, unless, due to consolidation, merger, bankruptcy or other factors, the number of available pharmaceutical company stocks which meet the eligibility criteria for inclusion in the Index is less than that amount. See January 1992 Letter, *supra* note 3.

<sup>9</sup> The five highest weighted stocks, with their respective weightings, in the Index on December 12, 1991, were: (1) Merck and Company Inc. (16.48%); (2) Glaxo Holdings PLC ADS (12.77%); (3) Bristol Myers Squibb Company (11.74%); (4) Johnson and Johnson (9.96%); and (5) Abbot Laboratories (7.26%). The five lowest weighted stocks, with their respective weightings, in the Index on December 12, 1991, were: (1) Upjohn Company (2.03%); (2) Rhone Poulenc Rorer Inc. (2.32%); (3) Syntex Corporation (2.66%); (4) Warner Lambert Company (2.69%); and (5) Marion Merrell Dow Inc. (2.80%).

<sup>10</sup> See Amendment No. 1, *supra* note 3.

<sup>1</sup> 15 U.S.C. 78s(b)(1) (1988).

<sup>2</sup> 17 CFR 240.19b-4 (1991).



### D. Eligibility Standards for the Inclusion of Stocks in the Index

Exchange Rule 901C specifies criteria for the inclusion of stocks in an index on which options will be traded on the Exchange. Specifically, Rule 901C states that an index must have a minimum of five stocks, and any index with less than 25 component stocks may not include stocks traded on the Amex.<sup>11</sup> In addition, in the case of an index of less than 25 stocks, Rule 901C dictates that at least 50% of the index group's numerical index value must be accounted for by stocks which meet the criteria of Exchange Rule 915, which establishes standards that stocks must meet to be eligible for options trading on the Exchange.

In choosing among pharmaceutical industry stocks that meet the minimum criteria set forth in Rule 901C, the Exchange will focus only on stocks that are traded on either the NYSE, Amex (subject to the limitations of Rule 901C)<sup>12</sup> or through the facilities of the NASDAQ/NMS System. The proposal also amends Rule 901C to require that at least 90% of the Index's numerical value be accounted for by stocks that meet the Exchange's options listing standards set forth in Exchange Rule 915.<sup>13</sup> Currently, all of the Index's component stocks are the subject of standardized options trading.

In addition, in choosing among pharmaceutical stocks that meet the minimum criteria set forth in Rule 901C, the Exchange will focus on stocks that have an average monthly trading volume of not less than 1,000,000 shares (or ADRs) in the U.S. market over the previous six month period. The Exchange also intends to focus on stocks that have a minimum market value (in U.S. dollars) of at least \$500 million.<sup>14</sup> Although the stocks currently

selected for inclusion in the Index meet or surpass these trading volume and marketplace criteria, the Exchange intends these additional criteria to be used as guidelines only and reserves the right to include stocks in the Index that may not meet these guidelines but, nevertheless, meet the minimum requirements set forth in Amex Rule 901C.

The Amex proposal provides that the component stocks of the Index will be monitored on a daily basis for corporate actions, such as, for example, stock splits, stock dividends or rights offerings, that may require a divisor adjustment to maintain continuity of the Index's value. In addition, pursuant to Amex Rule 901C, the Exchange will have the discretion to add, delete or substitute one or more stocks in the Index as it deems necessary or appropriate to maintain the quality and/or character of the Index. For instance, the Exchange may delete components from the Index as a result of a merger, consolidation, dissolution, bankruptcy or liquidation of an issuer of a component stock or a failure of a component to continue to meet the additional criteria for inclusion in the Index noted above. The Amex indicates that an adjustment to the Index will be made at the time any situation requiring an adjustment occurs.<sup>15</sup>

### E. Index Calculation

Similar to other stock index values published by the Exchange, the value of the Index will be calculated continuously and disseminated on a real-time basis to market information vendors via the Options Price Reporting Authority. The Index value for purposes of settling outstanding Index option contracts upon expiration will be calculated based upon the regular way opening sale prices for each of the Index's component stocks in their primary market on the last day prior to expiration. In the case of securities traded through the NASDAQ-NMS system, the first reported sale price will be used. Once all of the component stocks have been opened, the value of the Index will be determined and that value will be used as the settlement value for the options. If any of the component stocks do not open for trading on the last trading day before expiration, then the prior day's last sale price will be used in the calculation. In this regard, before deciding to use

Thursday's closing value of a component stock for the purpose of determining the settlement value of the Index, the Amex would wait until the end of the trading day Friday.<sup>16</sup>

### F. Contract Specifications

The proposed options on the Index will be cashed-settled, European-style options.<sup>17</sup> Standard options trading hours (9:30 a.m. to 4:10 p.m. New York time) will apply to the contracts. Under Amex Rule 903C, the Exchange intends to list up to three near-term calendar months and two additional calendar months in three month intervals in the January cycle. The Exchange also intends to list long-term options series, having up to thirty-six months to expiration, on either the full value Pharmaceutical Index or on a reduced value Pharmaceutical Index. In addition, the proposal provides that intervals between expiration months for both full value and reduced value long-term options will not be less than six months (*i.e.*, during any given year there will only be two long-term options listed). Strike price interval, bid/ask differential and continuity rules will not apply to the trading of Pharmaceutical LEAPS until their time to expiration is less than 12 months.<sup>18</sup>

The options on the Index will expire on the Saturday following the third Friday of the expiration month ("Expiration Friday"). Accordingly, since options on the Index will settle based upon opening prices of the component stocks on the last trading day before expiration (normally a Friday), the last trading day for an expiring Index option series will normally be the second to last business day before expiration (normally a Thursday).

### G. Listing of Options on a Reduced Value Pharmaceutical Index

The proposal provides that the Exchange may list long-term Index options that expire from 12 to 36 months from listing on a reduced value Pharmaceutical Index that will be computed at one-tenth the value of the Index. The Index value for reduced value Pharmaceutical LEAPS will be computed by dividing the Index by ten.

<sup>16</sup> For the purpose of daily dissemination of the Index value, if a stock included in the Index has not opened, the Amex will utilize the prior day's closing value of that stock when calculating the value of the Index until the trading of the stock opens.

<sup>17</sup> A European-style option only can be exercised during a specified period before the option expires.

<sup>18</sup> See Securities Exchange Act Release No. 25041 (October 16, 1987), 52 FR 40008 (October 26, 1987) (order approving SR-Amex-87-22).

<sup>11</sup> Accordingly, the Pharmaceutical Index as currently constituted does not include Amex-traded stocks. The Amex, however, has submitted a proposal, that, among other things, revises Amex Rule 901C to remove the limitation on the number of Amex stocks that can be included in an index which underlies a stock index option traded on the Exchange. Specifically, the proposal would allow, among other things, Amex-listed stocks to be included in Amex-traded index options that are comprised of less than 25 stocks. See Securities Exchange Act Release No. 30356 (February 10, 1992), 57 FR 5497.

<sup>12</sup> See note 11, *supra*.

<sup>13</sup> As mentioned above, Amex Rule 901C currently requires that only 50% of the stocks in an index consisting of less than 25 stocks be eligible for options trading.

<sup>14</sup> For ADRs, the proposal provides that the ADR price and total worldwide shares outstanding, on an ADR-equivalent basis, will be used for purposes of determining trading volume and market value.

<sup>15</sup> Nevertheless, the Amex must submit a rule filing with the Commission pursuant to section 19(b) of the Act if the Exchange determines to increase or decrease the number of stocks in the Index to greater than 20 or less than 10.



carrying out the value two digits beyond the decimal point, and rounding the second digit up if the third digit is five or greater. For example, if the full value of the Index is 216.86, the reduced value of the Index will be 21.69. The reduced value Index LEAPS will have a European-style exercise and will be subject to the same rules that govern the trading of all the Exchange's index options, including sales practice rules, margin requirements and floor trading procedures. The interval between strike prices for the reduced value Index LEAPS will be no less than \$2.50 instead of \$5.00.

#### *H. Position and Exercise Limits, Margin Requirements, and Trading Halts.*

Because the Index is a Stock Index Option, under Amex Rule 901C(a) and a Stock Index Industry Group under Rule 900C(b)(1), the proposal provides that Exchange rules that are applicable to the trading of narrow-based index options will apply to the trading of options on the Index. Specifically, Exchange rules governing margin requirements,<sup>19</sup> position and exercise limits,<sup>20</sup> and trading halt procedures<sup>21</sup> that are applicable to the trading of narrow-based index options will apply to options traded on the Index. The proposal further provides that for the purpose of determining whether a given position in full value and/or reduced Index options complies with applicable position and exercise limits, positions in reduced value Pharmaceutical LEAPS will be aggregated with positions in full value Index options. Specifically, under the proposal, ten reduced value contracts will equal one full value contract for the purpose of aggregating these positions.

#### *I. Surveillance.*

Surveillance procedures currently used to monitor trading in each of the

Exchange's other index options will also be used to monitor trading in options on the Index and the reduced value Index. These procedures include complete access to trading activity in the underlying securities. Further, the Intermarket Surveillance Group Agreement ("ISG Agreement"), dated July 14, 1983, as amended on January 29, 1990, will be applicable to the trading of options based on the Index.

#### *III. Findings and Conclusions*

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5).<sup>22</sup> Specifically, the Commission finds that the trading of Pharmaceutical Index options, including full value Pharmaceutical LEAPS, and reduced value Pharmaceutical LEAPS, will serve to protect investors, promote the public interest, and help to remove impediments to a free and open securities market by providing investors with a means to hedge exposure to market risk associated with securities in the pharmaceutical industry. Moreover, the Commission believes that the trading of options based on the Index will allow investors holding positions in some or all of the underlying securities in the Index to hedge the risks associated with their portfolios more efficiently and effectively. The trading of options on the Pharmaceutical Index and a reduced value Index, however, raises several concerns, namely issues related to index design, customer protection, surveillance, and market impact. The Commission believes, for the reasons discussed below, that the Amex adequately has addressed these concerns.

#### *A. Index Design and Structure*

The Commission finds that the Index is narrow-based because it is only comprised of fifteen stocks, all of which are within the pharmaceutical industry. Accordingly, the Commission believes it is appropriate for the Amex to apply its rules governing narrow-based index options to trading in the Index options.<sup>23</sup> Moreover, the Amex has developed several composition and maintenance criteria for the Index that the Commission believes will minimize the potential for manipulation of the Index. First, the Amex proposal requires that 90% of the weighting of the Index be

comprised of stocks that are eligible for standardized options trading.<sup>24</sup> In this regard, as noted above, all of the Index's component stocks currently are the subject of standardized options trading. Second, in selecting stocks for inclusion in the Index the Amex intends to focus on stocks that have a minimum market value of at least \$500 million. In this connection, all of the Index's component stocks currently meet or surpass this additional criterion. Third, although the Index is only comprised of fifteen stocks, no particular stock dominates the Index. For example, the three most highly weighted stocks in the Index account for 40.99% of the Index's value. Fourth, the proposal provides that the Amex will focus on stocks with an average monthly trading volume of not less than 1,000,000 shares over the previous six months for inclusion in the Index.<sup>25</sup> In fact, as of December 12, 1991, the average and median daily trading volume figures for the 15 component stocks of the Index were 629,000 shares and 510,000 shares, respectively. The Commission believes that these requirements will ensure that the Index will be almost entirely made up of stocks with large public floats that are actively traded, thus reducing the likelihood that the Index could be manipulated by abusive trading in the smaller stocks contained in the Index. Finally, because the Index is narrow-based, the applicable position and exercise limits and margin requirements will further serve to reduce the susceptibility of the Index to manipulation.

#### *B. Customer Protection*

The Commission believes that a regulatory system designed to protect public customers must be in place before the trading of sophisticated financial instruments, such as Pharmaceutical Index options and reduced value Pharmaceutical LEAPS, can commence on a national securities exchange. The Commission notes that the trading of standardized exchange-traded options occurs in an environment that is designed to ensure, among other things, that: (1) The special risks of

<sup>19</sup> Pursuant to Amex Rule 462(d)(2)(D)(iv), the margin requirements for the Index options will be: (1) For each short options position, 100% of the current market value of the options contract plus 20% of the underlying aggregate index value, less any out-of-the-money amount, with a minimum requirement of the options premium plus 10% of the underlying index value; and (2) for long options positions, 100% of the options premium paid.

<sup>20</sup> Pursuant to Amex Rules 904C and 905C, respectively, the position and exercise limits for the Index options will be 6,000 contracts, unless the Exchange determines, pursuant to Rules 904C and 905C, that a lower limit is warranted. Because reduced-value Index LEAPS will be 1/10th of the size of full value Index options, the position limit for these contracts will be 60,000 contracts.

<sup>21</sup> Pursuant to Amex Rule 918C, the trading of Index options on the Amex will be halted or suspended whenever trading in underlying securities whose weighted value represents more than 10% of the Index value are halted or suspended.

<sup>22</sup> 15 U.S.C. 78f(b)(5) (1988).

<sup>23</sup> See *supra* notes 19-21 and accompanying text.

<sup>24</sup> The options listing standards contain quality of market standards (i.e., price and trading volume requirements) and quality of issuer standards (i.e., minimum float and compliance with applicable provisions of the Act). These standards are imposed to ensure that stocks underlying options are widely-held and have sufficient trading volume and float so as not to be readily susceptible to manipulation.

<sup>25</sup> This trading volume requirement is considerably higher than the trading volume requirement contained in the options listing standards of 2,400,000 shares over a 12 month period. See January 1992 Letter, *supra* note 3.



options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risks of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because the Index options and reduced value Pharmaceutical LEAPS will be subject to the same regulatory regime as the other standardized options currently traded on the Amex, the Commission believes that adequate safeguards are in place to ensure the protection of investors in Pharmaceutical Index options and reduced value Pharmaceutical LEAPS.

### C. Surveillance

The Commission believes that a surveillance sharing agreement between an exchange proposing to list a stock index derivative product and the exchange(s) trading the stocks underlying the derivative product is an important measure for surveillance of the derivative and underlying securities markets. Such agreements ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the stock index product less readily susceptible to manipulation. In this regard, the primary market for all of the Index's constituent stocks, the NYSE,<sup>26</sup> is a member of the Intermarket Surveillance Group ("ISG"), which provides for the exchange of all necessary surveillance information concerning Amex-traded options based on the Index. In addition, should the Index contain stocks traded through the facilities of the NASDAQ/NMS system, the ISG Agreement would also provide for the necessary exchange of all relevant surveillance information concerning Amex-traded options based on the Index.<sup>27</sup>

<sup>26</sup> Two of the component stocks in the Index are NYSE-traded ADRs and the home country exchange for each of these stocks is the London Stock Exchange ("LSE") which has a surveillance sharing agreement with the Amex. See Agreement between the LSE and the Amex, dated July 1, 1991. If the Amex were to change the composition of the Index so that greater than 20% of the Index was represented by ADRs whose underlying securities were not subject to an effective surveillance sharing arrangement with the Amex, then it would be difficult for the Commission to reach the conclusions reached in this order and the Commission would have to determine whether it would be suitable to continue to trade options on the Index.

<sup>27</sup> ISG was formed on July 14, 1983 to, among other things, coordinate more effectively surveillance and investigative information sharing arrangements in the stock and options markets. See ISG Agreement, July 14, 1983. The most recent amendment to the ISG Agreement, which incorporates the original agreement and all amendments made thereafter, was signed by ISG members on January 29, 1990. See Second Amendment to the ISG Agreement, January 29, 1990.

### D. Market Impact

The Commission believes that the listing and trading of Pharmaceutical Index options and reduced value Pharmaceutical LEAPS on the Amex will not adversely impact the underlying securities markets. First, as described above, no one stock or group of stocks dominates the Index. Second, because 90% of the value of the Index must be accounted for by stocks that meet the options listing standards, the component securities generally will be actively-traded, highly-capitalized stocks. Third, existing Amex stock Index options rules and surveillance procedures will apply to the Index options and reduced value Pharmaceutical LEAPS. Fourth, the 8,000 contract position and exercise limits will serve to minimize potential manipulation and other market impact concerns. Fifth, positions in reduced value Pharmaceutical LEAPS will be aggregated with positions in options on the full value Index for position and exercise limit purposes. Sixth, the risk to investors of contra-party non-performance will be minimized because the Index options and reduced value Pharmaceutical LEAPS will be issued and guaranteed by the Options Clearing Corporation just like any other standardized option traded on a national securities exchange in the United States.

Lastly, the Commission believes that settling expiring Pharmaceutical Index options and the reduced value Pharmaceutical LEAPS based on the opening prices of component securities is reasonable and consistent with the Act because it may contribute to the orderly unwinding of Index options positions and positions in reduced-value Pharmaceutical LEAPS upon expiration as well as other benefits. In addition, as noted above, the Index only is comprised of 15 stocks from one industry sector. Accordingly, it appears less likely that any increased trading volume or volatility in the underlying stocks or the Index options associated with expiring Index options or reduced value Pharmaceutical LEAPS could spill over to the market as a whole. Moreover, because futures on narrow-based options are prohibited pursuant to the 1982 Jurisdictional Accord reached between the SEC and the Commodity Futures Trading Commission, it also appears unlikely that the level or volatility of intermarket trading associated with the Index options and reduced value Pharmaceutical LEAPS

will have an adverse impact on the market.<sup>28</sup>

The Commission finds good cause for approving Amendment No. 1 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the *Federal Register*. First, Amendment No. 1 requires that at least 90% of the Index's numerical index value be accounted for by stocks that meet the options listing standards. The Commission believes that this modification strengthens the integrity of the Index and does not raise new issues.<sup>29</sup> Moreover, the Commission finds that this modification to the proposal is designed to reduce the likelihood that the Index could be susceptible to manipulation. Second, Amendment No. 1 permits the Amex to list full value or reduced value Pharmaceutical LEAPS. The Commission notes that Pharmaceutical LEAPS are substantially similar to reduced-value LEAPS on the Standard & Poor's 100 and 500 Indexes that trade on the Chicago Board Options Exchange ("CBOE") and reduced-value long-term options on the Major Market Index that trade on the Amex.<sup>30</sup> The proposals for these products were subject to the full notice and comment period and the Commission did not receive any comments on them. Accordingly, the Commission does not find any different regulatory issues arising out of the current Amex proposal. Third, Amendment No. 1 requires the Exchange to submit a rule filing with the Commission pursuant to section 19(b) of the Act if the Exchange proposes to modify the number of stocks in the Index to greater than 20 or less than 10. The Commission believes that this proposal does not raise any new regulatory issues and it is designed to ensure that the composition of the Index will not change significantly without public comment and Commission review. Therefore, the Commission believes it is consistent with section 6(b)(5) of the Act to approve Amendment No. 1 to the Amex's proposal on an accelerated basis.

<sup>28</sup> See Futures Trading Act of 1982 section 101, Pub. L. 97-444, 96 Stat. 2294 (codified at 7 U.S.C. 2(a)).

<sup>29</sup> In addition, as noted above, existing Amex rules currently require that at least 50% of the weighting of an index be accounted for by stocks that meet the options listing standards.

<sup>30</sup> See Securities Exchange Act Release Nos. 28686 (December 10, 1990), 55 FR 51517 (order approving SR-CBOE-90-30), 25041 (October 16, 1987), 52 FR 40008 (order approving SR-Amex-87-22), and 28813 (November 14, 1990), 55 FR 48307 (order approving SR-Amex-90-14).



#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1 to the proposed rule change. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by July 15, 1992.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,<sup>31</sup> that the proposed rule change (SR-Amex-91-22) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>32</sup>

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 92-14830 Filed 6-23-92; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-30813; File No. SR-DTC-92-02]

#### Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change Relating to the Development of an Interface With the National Securities Clearing Corporation's Networking Service for Mutual Fund Transactions

June 15, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on March 2, 1992, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is

publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would allow DTC to provide to its members through DTC's Participant Terminal System the Networking service for mutual fund transactions provided by the National Securities Clearing Corporation ("NSCC").

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) The proposed rule change would create an interface that would give DTC Participants full access to NSCC's Networking service and its participating mutual funds. Networking would enable participating mutual fund and Networking users, including broker-dealers and banks, to exchange electronically, in a standardized format, non-trade account data such as subaccount information, closing position balances, and dividend processing records.

(b) The proposed rule change is consistent with Section 17A of the Act and the rules and regulations thereunder applicable to DTC since the proposed rule change will promote the prompt and accurate reporting and processing of transactions in mutual fund securities.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC included the proposed rule change in its Program Agenda paper and received comments from Participants. The comments from Participants that were not already direct NSCC Networking users were favorable.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reason for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of DTC. All submissions should refer to File No. SR-DTC-92-02 and should be submitted by July 15, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 92-14829 Filed 6-23-92; 8:45 am]  
BILLING CODE 8010-01-M

<sup>31</sup> 15 U.S.C. 78s(b) (1988).

<sup>32</sup> 17 CFR 200.30-3(a)(12) (1990).



[Release No. 34-30800; File No. SR-MCC-92-08]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by Midwest Clearing Corporation to Amend the Fund/SERV Interface Service Fee Schedule**

June 12, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on June 2, 1992, the Midwest Clearing Corporation ("MCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared substantially by MCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

MCC proposes to amend its Services and Schedule of Charges by adding certain fees for the Fund/SERV interface service.<sup>2</sup> The text of the Fund/SERV fee schedule is set forth below with the proposed modifications underlined:<sup>3</sup>

**Fund/SERV Service**

Fund/SERV is a service designed to facilitate order entry, confirmation, registration, and settlement of mutual fund transactions in an efficient, automated environment. The service standardizes mutual fund processing procedures, reduces operating costs, and speeds transaction settlement.

Monthly Maintenance Fee.....\$50.00  
Transaction Charge......50  
Fund/SERV Cash Adjustment Charge.....1.00

\*Mutual Fund Order Entry, Settlement and Registration...\$70 per settled transaction

\*Line Access Fee.....\$55.00 monthly

\*These are additional fees which are imposed on MCC Participants utilizing the Fund/SERV link through The Depository Trust Company.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, MCC included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. MCC has prepared summaries, set forth in section (A), (B), and (C) below, of the most significant aspects of such statements.

**(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

The purpose of the proposed rule change is to establish fees for the Fund/SERV interface through The Depository Trust Company ("DTC"). The interface allows MCC Participants to transmit Fund/SERV data to the National Securities Clearing Corporation ("NSCC") through DTC's Participant Terminal System. The proposed rule change is consistent with section 17A of the Act in that it facilitates the establishment of linked or coordinated facilities for clearance and settlement of transactions.

**(B) Self-Regulatory Organization's Statement on Burden on Competition**

MCC believes that no burden will be placed on competition as a result of the proposed rule change.

**(C) Self-Regulatory Organization's Statement of Comments on the Proposed Rule Change Received From Members, Participants, or Others**

No comments were received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder because it establishes or changes a due, fee, or other charge of the self-regulatory organization. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communication relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of MCC. All submissions should refer to File No. SR-MCC-92-8 and should be submitted by July 15, 1992.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 92-14828 Filed 6-23-92; 8:45 am]

BILLING CODE 8010-01-M

[Investment Company Act Rel. No. 18797; 811-6097]

**East-West Europe Fund, Inc.; Application**

June 18, 1992.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of Application for Deregistration under the Investment Company Act of 1940 ("Act").

**APPLICANT:** The East-West Europe Fund, Inc.

**RELEVANT ACT SECTION:** Section 8(f).

**SUMMARY OF APPLICATION:** Applicant seeks an order declaring that it has ceased to be an investment company.

**FILING DATE:** The application was filed on June 1, 1992.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a

<sup>4</sup> 17 CFR 200.30-3(a)(12) (1991).

<sup>1</sup> 15 U.S.C. 78s(b)(1) (1988).

<sup>2</sup> This interface service was approved by the Commission in Securities Exchange Act Release No. 30769 (June 2, 1992), 57 FR 24520.

<sup>3</sup> MCC modified the text of the proposed additions to the Fund/SERV fee schedule to clarify the proposed fees. Letter from Jeffrey E. Lewis, Associate Counsel, MCC, to Jerry Carpenter, Division of Market Regulation, Commission (June 10, 1992.)



hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on July 13, 1992, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC 450 Fifth Street NW., Washington, DC 20549. Applicant, Tower 49, 12 East 49th Street, New York, New York 10017.

**FOR FURTHER INFORMATION CONTACT:** Diane L. Titus, Paralegal Specialist, at (202) 272-3023 or Barry D. Miller, Senior Special Counsel, at (202) 272-3018 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

#### Applicant's Representations

1. Applicant is a closed-end non-diversified management investment company that is organized as a corporation under the laws of Maryland. On April 25, 1990, applicant registered under the Act and filed a registration statement pursuant to section 8(b) of the Act. Applicant also filed a registration statement under the Securities Act of 1933 (the "Securities Act") to register 9,775,000 shares of applicant's common stock.

2. Applicant's registration statement under the Securities Act was not declared effective, and applicant made no initial public offering. On November 27, 1991, applicant withdrew its registration statement pursuant to rule 477 under the Securities Act.

3. Applicant has never had any securityholders, assets, or liabilities. Applicant is not a party to any litigation or administrative proceeding. Applicant is not now engaged in, nor does it intend to engage in, any business activities other than those necessary for the winding up of its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-14826 Filed 6-23-92; 8:45 am]

BILLING CODE 8010-01-M

[Rel No. IC-18800; 812-7906]

#### IDS Life Insurance Company, et al.

June 18, 1992.

**AGENCY:** Securities and Exchange Commission (the "Commission" or the "SEC").

**ACTION:** Notice of Application for Exemption under the Investment Company Act of 1940 (the "1940 Act").

**APPLICANTS:** IDS Life Insurance Company ("IDS Life") and IDS Life Accounts F, IZ, JZ, G, H, and N (the "Variable Accounts").

**RELEVANT 1940 ACT SECTIONS:** Exemption requested under section 6(c) from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act.

**SUMMARY OF APPLICATION:** Applicants seek an order permitting the deduction of a mortality and expense risk charge from the assets of the Variable Accounts under a group, unallocated fixed/variable annuity contract for qualified retirement plans.

**FILING DATE:** The application was filed on April 17, 1992.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the SEC by 5:50 p.m. on July 13, 1992, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issue contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Mary Ellyn Minenko, Counsel, IDS Life Insurance Company, IDS Tower 10, Minneapolis, MN 55440.

**FOR FURTHER INFORMATION CONTACT:** Cindy J. Rose, Financial Analyst, at (202) 272-2060, or Wendell M. Faria, Deputy Chief, at (202) 272-2060, Office of Insurance Products (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application. The complete application is available for a fee from the Commission's Public Reference Branch.

#### Applicant's Representations

1. IDS Life is a stock life insurance company organized under the laws of Minnesota. It is a wholly owned subsidiary of IDS Financial Corporation which, in turn, is a wholly owned subsidiary of the American Express Company.

2. Variable Accounts F, G, and H were established on May 13, 1981. Variable Account N was established on April 12, 1985. Variable Accounts IZ and JZ were established on September 20, 1991. All of the Variable Accounts were established as separate accounts under Minnesota law to fund variable annuity contracts issued by IDS Life.

3. The Variable Accounts have filed with the Commission a Registration Statement on Form N-4 in connection with a new group, unallocated fixed/variable deferred annuity contract (the "Contracts") that is designed to fund employer group retirement plans (the "Plans") that qualify as retirement programs under the Internal Revenue Code of 1986, as amended (the "Code"). The Owners of the Contracts are plan sponsors or trustees of the Plans. Purchase payments may be accumulated before retirement on a variable basis, and annuity payments will be received after retirement on a fixed basis.

4. The Contracts allow the Owners to elect to have contract values accumulate in all of the six Variable Accounts as well as in the fixed account of IDS Life. The Variable Accounts, in turn, will invest solely in the shares of one of six of the IDS Life Retirement Annuity Mutual Funds (the "Funds"). The Funds are registered with the Commission as diversified open-end management investment companies.

5. IDS Life will assess the Owner of the unallocated Contracts a quarterly contract administrative charge of \$125. IDS Life reserves the right to increase this contract administrative charge in the future, but guarantees that it will never exceed \$250 per quarter. The contract administrative charge does not apply after retirement payments begin. The contract administrative charge represents reimbursement for only the actual administrative costs expected to be incurred over the life of the Contracts.

6. No sales charge is collected or deducted at the time purchase payments are applied under the Contracts. A contingent deferred sales charge ("withdrawal charge") will be assessed on certain full or partial withdrawals or when a Contract is transferred to another funding agent or is terminated. A withdrawal charge applies if all or



part of the contract value is withdrawn, if the total contract value is transferred to another funding agent, or if a Contract is terminated during the first seven contract years. The withdrawal charge starts at 6 percent during the first two contract years and is reduced by 1 percent each contract year thereafter so that no withdrawal charge applies after seven contract years. The withdrawal charge cannot be increased during the life of the Contracts. No withdrawal charge will be imposed upon amounts withdrawn from the Contracts because a participant in the Plan attains age 59½; purchases an immediate annuity under the annuity settlement provisions of the Contract after separation from service; retires under the provisions of the Plan and the Code; receives a loan as requested by the Owner; or converts contract value to an individual retirement annuity or other qualified annuity offered by IDS Life as requested by the Owner.

7. Certain states and local governments impose premium taxes. IDS Life will make a charge against the contract value for any premium taxes to the extent the taxes are payable.

8. As compensation for assuming mortality and expense risks, IDS Life will assess the Variable Accounts a daily mortality and expense risk charge equal to one percent of the average daily net assets of the Variable Accounts on an annual basis. IDS Life estimates that approximately two-thirds of this charge is for assumption of the mortality risk and one-third is for the assumption of the expense risk. This charge cannot be increased during the life of the Contracts and does not apply after retirement payments begin. IDS Life expects to profit from the mortality and expense risk charge. Any profit would be available to IDS Life for any proper corporate purpose including payment of distribution expenses.

9. IDS Life assumes an expense risk because the contract administrative charge may be insufficient to cover actual administrative expenses. These include the costs and expenses of processing purchase payments, retirement payments, withdrawals and transfers; furnishing confirmation notices and periodic reports; calculating mortality and expense charges; preparing voting materials and tax reports; updating registration statements for the Contracts; and actuarial and other expenses.

10. IDS Life assumes certain mortality risks by its contractual obligation to continue to make retirement payments for the entire life of the annuitant under annuity obligations which involve life contingencies. This assures each

annuitant that neither the annuitant's own longevity nor an improvement in life expectancy generally will have an adverse effect on the retirement payments received under the Contracts. This relieves that annuitant from the risk of outliving the amounts accumulated for retirement. The payment option tables contained in the Contracts are based on the 1983 Individual Annuity Mortality Tables. These tables are guaranteed for the life of the Contracts.

#### Applicants' Legal Analysis and Conditions

1. Applicants seek an exemption from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to the extent necessary to permit the issuance and sale of the Contracts providing for the deduction of a mortality and expense risk charge. Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act prohibit a registered unit investment trust and any depositor thereof or underwriter therefor from selling periodic payment plan certificates unless the proceeds for all payments (except such amounts as are deducted for sales load) are deposited with a trustee or custodian having the qualifications prescribed by section 26(a)(1) of the 1940 Act and held under an agreement which provides that no payment to the depositor or principal underwriter shall be allowed except as a fee, not exceeding such reasonable amount as the Commission may prescribe, for bookkeeping and other administrative services.

2. Applicants represent that the level of the mortality and expense risk charge is within the range of industry practice for comparable variable annuity products. IDS Life has reviewed publicly available information about other qualified annuity products, taking into consideration such factors as current charge levels, charge guarantees, sales loads, surrender charges, availability of funds, investment options available under annuity contracts, market sector and the availability of qualified plans. IDS Life will maintain at its principal office, and make available on request of the Commission or its staff, a memorandum setting forth in detail the variable annuity products analyzed and the methodology, and results of, its comparative review.

3. Applicants acknowledge that the withdrawal charge may be insufficient to cover all distribution costs and that, if a profit is realized from the mortality and expense risk charge, all or a portion of that profit may be offset by distribution expenses not reimbursed by the withdrawal charge.

Notwithstanding the foregoing, IDS Life has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements made with respect to the Contracts will benefit the Variable Accounts and investors in the Contracts. The basis for such conclusion is set forth in a memorandum which will be maintained by IDS Life at its principal office and will be available to the Commission or its staff on request.

4. IDS Life represents that each Variable Account will invest only in any underlying mutual fund which, in the event it should adopt any plan under Rule 12b-1 to finance distribution expenses, would have such plan formulated and approved by a board of directors, a majority of the members of which are not "interested persons" of such fund within the meaning of section 2(a)(19) of the 1940 Act.

#### Conclusion

Applicants submit that for the reasons stated above, the requested exemptions from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act for the deduction of a mortality and expense risk charge meet the standards in section 6(c) of the 1940 Act.

Accordingly, Applicants assert that the requested exemptions are necessary and appropriate in the public interest and consistent with the protection of investors and the policies and purposes of that Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-14825 Filed 6-23-92; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-18798/File No. 812-7882]

#### Principal Mutual Life Insurance Company, et al.

Dated: June 18, 1992.

**AGENCY:** Securities and Exchange Commission ("SEC" or "Commission").

**ACTION:** Notice of application for an Order under the Investment Company Act of 1940 (the "1940 Act" or the "Act").

**APPLICANTS:** Principal Mutual Life Insurance Company ("Principal Mutual"), Principal Mutual Life Insurance Company Separate Account B ("Separate Account B") and Princor Financial Services Corporation ("Princor").



**RELEVANT 1940 ACT SECTIONS:** Order requested pursuant to section 6(c) of the Act granting exemptions from sections 2(a)(35), 26(a)(2)(C), 27(a)(2) and (3) and 26(c)(2) of the Act.

**SUMMARY OF APPLICATION:** Applicants seek an order to permit a premium based sales load with volume discounts to be imposed under a variable annuity contract and to permit contractholders to remit sales load payments independent of premium payments in connection with certain variable annuity contracts. In addition, Applicants request relief to the extent necessary to permit the deduction of a mortality and expense risk charge from the assets of Separate Account B.

**FILING DATE:** The Application was filed on February 28, 1992 and amended on June 11, 1992.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on July 13, 1992, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, The Principal Financial Group, Des Moines, IA 50392-0300.

**FOR FURTHER INFORMATION CONTACT:** Thomas E. Bisset, Attorney, at (202) 272-2058, or Wendell M. Faria, Deputy Chief, at (202) 272-2060, Office of Insurance Products (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from the SEC's Public Reference Branch.

#### Applicants' Representations

1. Principal Mutual is a mutual life insurance company with its home office in Des Moines, Iowa. It is authorized to do business in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the Canadian Provinces of Alberta, British Columbia, Manitoba, Ontario and Quebec. Principal Mutual sells life, disability, and health insurance, and annuities written both on an individual and group basis.

2. Separate Account B was established under Iowa insurance law on January 12, 1970. Separate Account B is registered under the Act as a unit investment trust (File No. 811-2091) and is divided into three divisions ("Divisions") corresponding to the three mutual funds ("Mutual Funds") in which its assets may be invested. The Mutual Funds are diversified, open-end, management investment companies that serve as funding vehicles for variable insurance products of Principal Mutual and are not offered directly to the public.

3. Princor, a wholly-owned subsidiary of Principal Mutual, is the principal underwriter of the Contracts. It is a broker-dealer registered under the Securities Exchange Act of 1934 and a member of the National Association of Securities Dealers, Inc. The Contracts are sold by licensed life insurance agents who are registered representatives either of Princor or of independent broker-dealers authorized to sell the Contracts pursuant to agreements with Princor.

4. The Contracts are group variable annuity contracts that provide for the accumulation of values and the payment of annuity benefits on a variable basis. They are of two types: (1) The Premier Variable-Group Variable Annuity Contract ("Premier Variable Contract"); and the Personal Variable-Group Variable Annuity Contract ("Personal Variable Contract") (together, the "Contracts"). Registration statements on Form N-4 for the Premier Variable Contract (File No. 33-44670) and the Personal Variable Contract (File No. 33-44565) were filed with the Commission pursuant to the Securities Act of 1933. The Contracts are designed for use in connection with retirement plans

("Plans") qualifying for special income tax treatment under the Internal Revenue Code of 1986 (the "Code") and those which may not so qualify. The Contracts will be issued to a contractholder ("Contractholder"), such as an employer, association, or trust to fund a Plan. Principal Mutual will also sell to certain Contractholders group fixed-dollar annuity contracts that do not have to be registered with the Commission ("Companion Contracts"). Subject to specific limits in the Contracts, assets may be transferred from a Contract to a Companion Contract and vice versa.

5. Under the terms of the Premier Variable Contract, the Contractholder must pay a contract administration expense of \$300 per year plus an amount calculated by multiplying the "Time-Weighted Balance" by the Annual Expense Factor. The Time Weighted Balance for a particular Premier Variable Contract is the total of all Investment Accounts under that Contract at the beginning of each deposit year, adjusted by time-weighted deposits to and withdrawals from the accounts during the period. The Annual Expense Factor for a deposit year is determined using total funds under the Premier Variable Contract and a Companion Contract (if any) as of the last day of the preceding deposit year according to a schedule set forth in the Contract that varies from .35% for less than \$150,000 to less than .06% for total funds in excess of \$30 million. The contract administration expense will be reduced by 10% if Principal Mutual has issued an Associated Contract to the Contractholder. In addition, if Principal Mutual has issued a Companion Contract to the Contractholder, the \$300 portion of the contract administration expense is pro-rated between the Contracts based on their relative account values.

6. A Premier Variable Contractholder must also pay a quarterly recordkeeping expense which is based on the number of plan participants, both active and inactive, for whom correlating Investment Accounts have been established under the Contract at the end of each quarter according to the following schedule:

Plan participants	Annual expense (benefit reports sent directly to owners of benefits)	Annual expense (benefit reports sent to contractholders)
0-499	\$28 per Plan Participant + \$ 300	\$25 per Plan Participant + \$300
500-999	23 per Plan Participant + 2,800	20 per Plan Participant + 2,800
1,000-2,499	18 per Plan Participant + 7,800	15 per Plan Participant + 7,800
2,500 and over	Determined by the Company	Determined by the Company



The recordkeeping expense is reduced by 10% if plan participant data, investment elections, and ongoing contributions are reported in Principal Mutual's standard format on magnetic tapes or computer diskettes. In addition, the recordkeeping expense is based on the assumption that the employer and plan participants will receive quarterly benefit reports. If instead of quarterly benefit reports, the Company provides such reports annually, the recordkeeping expense is reduced by 9%. Similarly, if such reports are provided semi-annually, the recordkeeping expense is reduced by 6%. If such reports are provided on a monthly basis, the recordkeeping expense is increased by 24%. If the Company performs more (or less) than two 401(k)/401(m) non-discrimination tests in a Deposit Year, the recordkeeping expense is increased (reduced) by 3% for each additional test performed (or test not performed).

7. A Premier Variable Contractholder may have the per-participant recordkeeping expenses deducted from an individual account which correlates to an inactive plan participant. A person is considered to be an inactive plan participant after his or her termination of employment, retirement, disability, or death. If the recordkeeping expense is deducted from an Investment Account, the recordkeeping expense shall be reduced, if necessary, so that the quarterly charge will not exceed 1% of an individual inactive plan participant's aggregate Investment Accounts at the time the charge is made. Any deductions from Investment Accounts are made pursuant to Rule 26a-1. Applicants represent the per-participant recordkeeping expenses and the contract administration expenses paid by Contractholders would also satisfy that at-cost standard, were Rule 26a-1 applicable to payment of such expenses.

8. A sales charge is billed to and paid by a Premier Variable Contractholder according to one of the following schedules as elected by the Contractholder:

Amount of plan contributions in each deposit year	Amount payable as a percent of plan contributions
<b>Schedule A:</b>	
The first \$5,000.....	4.50
The next \$5,000.....	3.00
The next \$5,000.....	1.70
The next \$35,000.....	1.40
The next \$50,000.....	0.90
The next \$400,000.....	0.60
Excess over \$500,000.....	0.25
<b>Schedule B:</b>	
The first \$50,000.....	3.00
The next \$50,000.....	2.00
The next \$400,000.....	1.00
The next \$2,500,000.....	0.50

Amount of plan contributions in each deposit year	Amount payable as a percent of plan contributions
Excess over \$3,000,000.....	0.25

No sales charge will be assessed if a Contractholder acquires the Contract either (i) directly from Principal Mutual upon the recommendation of an independent Pension consultant who receives no remuneration from Principal Mutual, or (ii) a registered representative of Princor who is also a group insurance representative of Principal Mutual.

9. Principal Mutual assumes mortality and expense risks under each of the Contracts. For assuming these risks, Principal Mutual, in determining unit values for Separate Account B and variable annuity payments, makes a charge as of the end of each valuation period against the assets of Separate Account B held with respect to the Contract. The charge is equivalent to a simple annual rate of 0.33% for the Premier Variable Contract and .55% for the Personal Variable Contract. If the charge is insufficient to cover the actual cost of the mortality and expense risks assumed, the financial loss will fall on Principal Mutual; conversely, if the charge proves more than sufficient, the excess will be a gain to Principal Mutual.

10. Under each Contract, an additional annual recordkeeping expense of \$25 may be charged for each plan participant receiving benefits under a Flexible Income Option. A Flexible Income Option allows plan participants to determine how much of their benefits to withdraw each year from the plan, subject to the minimum distribution requirements of the Code.

11. Under the Personal Variable Contract, a contract administration expense/recordkeeping charge is taken directly out of each Investment Account, unless the Contractholder agrees in a separate revocable written agreement to pay all or a portion of the charge. The fixed-dollar charge is \$25 per year per plan participant if Principal Mutual can send reports to the Contractholder for distribution to plan participants or \$28 if the reports must be sent directly to plan participants. The fixed-dollar charge is reduced by 10% if plan participant data, investment elections, and ongoing contributions are reported in Principal Mutual's standard format on magnetic tapes or computer diskettes. The amount charged is based on the assumption that four plan benefits reports will be sent out each year to plan participants, with variations in price for more or less

frequent reports. Expenses also vary depending on the number of nondiscrimination tests performed each year for a Contractholder. The other portion of the administrative expense/recordkeeping charge is based on the Time-Weighted Balance. This charge will be 0.35% of the Time-Weighted Balance (on an annual basis), but will be reduced by 10% if Principal Mutual has issued an Associated Contract to the Contractholder. A cap is imposed under the Personal Variable Contract which limits the annual administration expense/recordkeeping charge to an annual maximum of 4.00% of the value of an Investment Account if the charge is deducted from the Individual Account of a plan participant. The administration expense/recordkeeping charge is collected at the earlier of (i) the date that there is a full redemption of all Investment Accounts of a plan participant or (ii) the last day of each quarter of the Deposit Year. Principal Mutual does not expect to recover from the charge any amount above its accumulated expenses associated with the administration of the Contracts. Applicants rely upon Rule 26a-1 in connection with deductions of the contract administration/recordkeeping charge from Investment Accounts.

12. A contingent deferred sales load may be deducted from an Investment Account which correlates to a plan participant for any cash withdrawal, including transfers of money to a funding agent other than a Companion Contract, subject to the limitations described below. Currently, the maximum contingent deferred sales charge is 5.00% of the amount withdrawn in the first year the Investment Account has been established and decline to zero after seven years. Principal Mutual relies upon Rule 6c-8 to deduct this charge. Principal Mutual monitors the individual Investment Accounts to ensure that the total contingent deferred sales charges deducted from an Investment Account will never exceed 9.00% of the purchase payments to which the charge relates. The contingent deferred sales charge does not apply to withdrawals made as a result of a participant's death, retirement, or total and permanent disability. In addition, no charge will apply to transfers between Investment Accounts, transfers to a Companion Contract, or amounts applied to provide variable annuity payments.

#### Applicants' Legal Analysis and Discussion

1. Section 2(a)(35) of the Act defines the term "sales load" as the difference



between the price that a security is offered to the public and the portion of the proceeds from the sale which are received and invested. Sections 27(a)(2) and 27(a)(3) of the Act prohibit any registered investment company from issuing periodic payment plan certificates or any depositor or underwriter for such company from selling a certificate if the amount of sales load deducted from any of the first twelve monthly payments or their equivalent exceeds 50% of such a payment or if the sales load deducted from any one of such payments exceeds proportionately the amount deducted from any other such payment, or if the sales load deducted from any subsequent payment exceeds the amount deducted from any other subsequent payment. Rule 27a-2 under the Act exempts a registered separate account from the provisions of section 27(a)(3), provided that, for any variable annuity contract participating in the separate account, the proportionate amount of sales load deducted from any payment shall not exceed the proportionate amount deducted from any prior payment.

2. The Premier Variable Contract's sales load is billed to a Contractholder, who either pays the amount billed by sending Principal Mutual one check which includes both its current contributions to the Contract and an amount for the sales load, or by sending contributions in one check and sales load expenses in a subsequent check. Each situation raises issues under section 27(a)(3) of the Act and the second situation also raises issues under sections 2(a)(35) and 27(a)(2). Applicants, therefore, request exemptive relief from sections 2(a)(35), 27(a)(2) and 27(a)(3), to the extent necessary to permit the sale of Premier Variable Contracts.

3. Because the volume discount for the Premier Variable Contracts applies to payments in a single year, it is possible that a Contractholder may have a higher percentage of sales load deducted from contributions in some subsequent years than in either the first year or certain other subsequent years, a loading pattern that would violate the literal requirements of section 27(a)(3) of the Act and would be ineligible for the exemptive relief provided by Rule 27a-2.

4. Applicants submit that an exemption from section 27(a)(3) is appropriate because the same percentage sales load is deducted for the scheduled amounts in each Deposit Year and because the Contract provides identical schedules of charges for each Deposit Year. The abuse intended to be

curbed by section 27(a)(3) (excessive front-end loading of periodic payment plans) is not presented where the maximum sales load is 4.5% or 3% (depending upon the Schedule chosen), and where variations in sales load permit Contractholders to take advantage of volume discounts.

5. If a Contractholder makes a contribution by one check and then pays the sales load by a subsequent check, nothing would be deducted from the contribution payment for sales load. However, if the subsequent sales load payment were deemed to be another Contract payment, 100% of that payment would be deducted for sales load. In addition, it is possible that the sales load payment for contributions made late in a deposit year might not be made until early in the next deposit year. Accordingly, Applicants request exemptions from sections 2(a)(35) and 27(a)(2) to the extent necessary to permit Contractholders to elect to pay sales loads by separate subsequent checks rather than solely by deduction from Contract contributions. Permitting Contractholders to delay paying sales loads is a benefit to Contractholders and plan participants. Because the subsequent check is not actually a Contract payment, but rather the sales load payment for earlier contributions, the substance of what is prohibited by section 27(a)(2) is not presented by the proposed sales load payment procedures.

6. Applicants also seek an exemption from sections 26(a)(2)(C) and 27(c)(2) of the Act to the extent necessary to permit the deduction of a mortality and expense risk charge from the assets of Separate Account B in connection with the Contracts. Applicants represent that the 0.33% and 0.55% charges for the Contracts are within the range of industry practice for comparable annuity products. This representation is based upon an analysis by Principal Mutual of publicly available information about selected similar industry products, taking into consideration such factors as the method used in charging sales loads, any contractual right to increase charges above current levels and the existence of charges against separate account assets for other than mortality and expense risks. Principal Mutual shall maintain at its principal office, available to the Commission upon request, a memorandum setting forth in detail the products analyzed in the course of, and the methodology and results of, the comparative survey made.

7. Applicants acknowledge that the sales load and the deferred sales charge under the Premier Variable Contract and

the Personal Variable Contract, respectively, will be insufficient to cover all costs relating to the distribution of the Contracts and that if a profit is realized from the mortality and expense risk charge, all or a portion of such profit may be offset by distribution expenses not reimbursed by sales charges. In such circumstances a portion of the mortality and expense risk charge might be viewed as providing for a portion of the costs relating to distribution of the Contracts. Notwithstanding the foregoing, Principal Mutual has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements made with respect to the Contracts will benefit Separate Account B, the Contractholders and plan participants. The basis for that conclusion is set forth in a memorandum which shall be maintained by Principal Mutual at its principal office and will be available to the Commission upon request. Moreover, Principal Mutual represents that Separate Account B will invest only in underlying mutual funds which undertake, in the event such funds should adopt any plan under Rule 12b-1 to finance distribution expenses, to have such plan formulated and approved by a board of directors, a majority of the members of which are not "interested persons" of such fund within the meaning of section 2(a)(19) of the Act.

#### Conclusion

1. Section 6(c) under the Act provides, in pertinent part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provisions of the Act or any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. On the basis of the foregoing, Applicants assert that the exemptions requested are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-14827 Filed 6-23-92; 8:45 am]

BILLING CODE 8010-01-M



[Release No. IC.-18801/File No. 812-7918]

**State Mutual Life Assurance Company of America, et al.**

June 18, 1992.

**AGENCY:** Securities and Exchange Commission (the "Commission" or the "SEC").

**ACTION:** Notice of Application for an Order under the Investment Company Act of 1940 (the "1940 Act").

**APPLICANTS:** State Mutual Life Assurance Company of America ("State Mutual"), State Mutual Separate Account I ("Account I"), and Allmerica Investments, Inc.

**RELEVANT 1940 ACT SECTIONS:** Order requested under section 6(c) of the 1940 Act for exemptions from sections 26(a)(2)(C) and 27(c)(2) thereof.

**SUMMARY OF APPLICATION:** Applicants seek an order approving the assessment and deduction of a mortality and expense risk charge from the assets of Account I, which serves as the funding medium for certain group combination fixed/variable annuity contracts issued by State Mutual (the "Contracts").

**FILING DATE:** The Application was filed on May 11, 1992.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m., on July 13, 1992, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicants, c/o Rodney J. Vessels, State Mutual Life Assurance Company of America, 440 Lincoln Street, Worcester, Massachusetts, 01653.

**FOR FURTHER INFORMATION CONTACT:** Patrice M. Pitts, Attorney, at (202) 272-3040, or Michael V. Wible, Special Counsel, at (202) 272-2060, Office of Insurance Products (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

**Applicants' Representations**

1. State Mutual is a mutual life insurance company organized in 1844 under the laws of Massachusetts.

2. State Mutual is the depositor and sponsor of Account I, a unit investment trust registered under the 1940 Act which serves as the funding medium for the Contracts. Account I presently consists of five subaccounts, each of which will invest solely in the shares of one of the investment portfolios of Allmerica Investment Trust (the "Trust"), a diversified open-end management investment company, organized as a Massachusetts business trust.

3. Shares of the Trust's investment portfolios (the "Funds") also are offered to separate accounts of a State Mutual affiliate which fund variable annuity contracts and flexible premium variable life insurance policies.

4. Allmerica Investments, Inc., an indirect wholly-owned subsidiary of State Mutual, is the principal underwriter for the Contracts. Allmerica Investments, Inc. is a registered broker-dealer under the Securities Exchange Act of 1934, and is a member of the National Association of Securities Dealers.

5. The Contracts are group combination fixed/variable contracts that will establish for the benefit of participants ("Participants") individual retirement annuities ("IRA Accounts") qualifying for federal income tax treatment under section 408 of the Internal Revenue Code. Participants may invest in any one or more of the subaccounts of Account I, and may also invest in subaccounts of the general account of State Mutual ("General Account") for accumulation on a fixed basis.

6. Upon death of the Participant prior to the annuity commencement date, State Mutual will pay the beneficiary a death benefit equal to the accumulated value of the IRA Account as of the valuation date coincident with or next following the date of receipt of due proof of death at State Mutual's home office.

7. Prior to the annuity commencement date, State Mutual assesses an IRA Account fee of \$25 at each anniversary of the IRA Account and at full surrender for its costs in maintaining each IRA Account. State Mutual guarantees that this charge will not increase.

8. Prior to the annuity commencement date, State Mutual assesses each subaccount of Account I a daily charge (the "Administrative Expense Charge") equal to 0.25% (on an annual basis) of the average daily net assets of that subaccount. The charge is assessed to

help defray expenses actually incurred in the administration of the subaccount of Account I. State Mutual believes that the Administrative Expense Charge and the IRA Account fee have been set at a level that will recover no more than the actual costs associated with administering the IRA Accounts under the Contracts and Account I. State Mutual guarantees that the level of both charges will not increase over the life of the Contract.

9. State Mutual makes a deduction for state and municipal premium taxes, where applicable.

10. No charge for sales expenses is deducted from contributions at the time contributions are made. However, the Contracts assess a withdrawal charge of 4% of any amount withdrawn from a General Account subaccount on other than its maturity date and upon election of an annuity for a specified number of years.

11. No sales charge is deducted upon withdrawal from any subaccount of Account I.

12. The withdrawal charge is retained by State Mutual to reimburse it for the expenses incurred in connection with the sale of the Contracts and certificates thereunder, including promotional costs, sales administration, and other sales-related expenses.

13. For assuming certain mortality and expense risks under the Contracts, State Mutual will deduct from the daily net asset value of each subaccount of Account I an amount computed daily which is equal to an annual rate of 0.90 percent. The mortality risk arises from State Mutual's guarantee that it will make annuity payments in accordance with annuity rate provisions established in the Contract at the time it is issued for the life of the payee (or in accordance with the annuity option selected), no matter how long the payee lives and no matter how long all payees as a class live. The expense risk arises from State Mutual's guarantee that the charges it makes under the Contracts will never exceed the limits established in the Contracts. The approximate allocation of the mortality and expense risk charge is 0.25% for State Mutual's assumption of mortality risks and 0.65% for State Mutual's assumption of expense risks. Applicants represent that the level of this charge is guaranteed and will not increase.

14. If the charge for mortality and expense risk is insufficient to cover the actual costs of mortality experience and expenses, State Mutual will absorb the losses. If expenses are less than the amounts resulting from the charge, the difference will be a profit to State



Mutual. To the extent that this charge results in a profit to State Mutual, such profit will be available for use by State Mutual for any lawful purpose, including the payment of sales, distribution, and other expenses not covered by the withdrawal charge.

#### Applicants' Legal Analysis and Conditions

1. Section 26(a)(2)(C) and 27(c)(2), as herein pertinent, prohibit a registered unit investment trust and any depositor thereof or underwriter therefor from selling periodic payment plan certificates unless the proceeds of all payments (other than sales load) are deposited with a qualified bank as trustee or custodian and held under arrangements which prohibit any payment to the depositor or principal underwriter except a fee, not exceeding such reasonable amounts as the Commission may prescribe, for performing bookkeeping and other administrative services. Applicants request an exemption from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to the extent any relief is necessary to permit the deduction from Account I of the mortality and expense risk charge under the Contracts.

2. Applicants represent that the mortality and expense risk charge is within the range of industry practice for comparable annuity products. This representation is based upon State Mutual's comparative survey of publicly available information about similar industry products, and takes into account such factors as total asset charges, policy fees, death benefits, annuity options and annuity guarantees. State Mutual will maintain at its administrative offices and make available to the Commission a memorandum setting forth in detail the products analyzed in the course of, and the methodology and results of, its comparative survey of industry practice for mortality and expense risk charges.

3. Applicants acknowledge that the withdrawal charge may be insufficient to cover the actual costs relating to the distribution of the Contracts. In such case, the costs will be paid from the assets of the General Account, which may include gains from operations with respect to the Contracts or any profit derived from the mortality and expense risk charge. State Mutual represents that there is a reasonable likelihood that the proposed distribution financing arrangement will benefit Account I and the Participants. State Mutual will maintain at its administrative offices and make available to the Commission a memorandum setting forth the basis for its conclusion.

4. State Mutual represents that Account I will invest only in management investment companies which undertake, in the event they adopt plans under Rule 12b-1 under the 1940 Act to finance distribution expenses, to have such plans formulated and approved by a board of trustees (or directors), a majority of whom are not "interested persons" of such investment companies within the meaning of section 2(a)(19) of the 1940 Act.

#### Conclusion

For the reasons and on the basis of the facts set forth above, Applicants assert that the requested exemptions from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to deduct the mortality and expense risk charge under the Contracts meet the standards in section 6(c) of the 1940 Act. Applicants assert the requested exemptions are necessary and appropriate in the public interest, and are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-14824 Filed 6-23-92; 8:45 am]

BILLING CODE 9010-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of 49 CFR Part 236

Pursuant to 49 CFR part 235 and 49 U.S.C. app. 26, the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236 as detailed below.

#### Block Signal Application (BS-AP)-No. 3175

##### Applicants:

CSX Transportation, Mr. W.J. Scheerer, Chief Engineer-Train Control, 500 Water Street, Jacksonville, Florida 32202.

Indiana Hi-Rail Corporation, Mr. R. Powell Felix, President, R.R. 1, Connersville, Indiana 47331.

City of Tiffin Port Authority, Mr. James D. Supance, Chairman, P.O. Box 767, Tiffin, Ohio 44883-0767.

CSX Transportation (CSXT), Indiana Hi-Rail Corporation, and the City of Tiffin Port Authority jointly seek approval of the proposed discontinuance and removal of Tiffin Interlocking, milepost B124.3, near Tiffin, Ohio, on the Detroit Division, Willard Subdivision of CSXT; consisting of the conversion of five power-operated switches (numbers 28, 37, 38, 44, and 45) to hand operation, removal of all remaining power-operated switches and movable point frogs, and removal of all controlled signals. The carrier proposes to operate by signal indications of an automatic block signal system within yard limits.

The reason given for the proposed changes is that the facilities are no longer needed for present day operation.

#### BS-AP-No. 3176

*Applicant:* Chicago and North Western Transportation Company, Mr. D.E. Waller, Vice President-Engineering and Materials, One North Western Center, Chicago, Illinois 60606.

The Chicago and North Western Transportation Company seeks approval of the proposed reduction of the limits to "CY" Interlocking, milepost 2.7, near Chicago, Illinois, on the Kenosha Subdivision; consisting of the conversion of power-operated switch No. 40 to hand operation and the relocation of dwarf signal No. 39SL.

The reason given for the proposed changes is the partial retirement of yard track No. 6, with the remaining stub track used for occasional storage of work equipment.

#### BS-AP-No. 3177

*Applicant:* Southern Pacific Transportation Company, Mr. J.A. Turner, Engineer-Signals, Southern Pacific Building, One Market Plaza, San Francisco, California 94105.

The Southern Pacific Transportation Company seeks approval of the proposed discontinuance and removal of the automatic block signal system between milepost 1216.12 and milepost 1216.43, on the Clifton Branch single track, near Clifton, Arizona, Lordsburg District, El Paso Division, consisting of the discontinuance and removal of all automatic block signals. The carrier proposes to operate under yard limit rules.

The reason given for the proposed changes is that the traffic no longer requires the signal system for present day operations.

#### BS-AP-No. 3178

##### Applicant:

Northern Indiana Commuter Transportation District, Mr. Victor R.



Babin, General Manager, 601 North Roeske Avenue,  
Michigan City, Indiana 46360-2669.  
Chicago SouthShore and South Bend Railroad, Mr. H. Terry Hearst,  
President, 505 North Carroll Avenue,  
Michigan City, Indiana 46360-5082.

The Northern Indiana Commuter Transportation District and Chicago SouthShore and South Bend Railroad jointly seek approval of the proposed modification of the automatic block signal system, on the single main track, between milepost 1.9 and milepost 3.18, near South Bend, Indiana, consisting of the discontinuance and removal of three automatic block signals, numbers 18, 24, and 25.

The reason given for the proposed changes is that future traffic reduction and the resultant minimal usage does not warrant the continued maintenance of the block signal system on this trackage.

#### Rule, Standards and Instructions Application (RS&I-AP)-No. 1081 Reconsideration

*Applicant:* CSX Transportation, Mr. W.J. Scheerer, Chief Engineer-Train Control, 500 Water Street, Jacksonville, Florida 32202.

*Predecessor applicant:* Richmond, Fredericksburg and Potomac Railroad Company.

CSX Transportation seeks relief from the requirements of § 236.566 of the Rules, Standard and Instructions to the extent that CSXT be allowed to operate non-equipped CSXT locomotives between Richmond, Virginia, milepost 4.8 and Doswell, Virginia, milepost 21.8, on the RF&P Subdivision, Baltimore Division, former trackage of the Richmond, Fredericksburg and Potomac Railroad Company.

*Applicant's justification for relief:* To afford economies of operation, in that excess CSXT trackage would be abandoned.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the protestant in the proceeding. The original and two copies of the protest shall be filed with the Associate Administrator for Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 within 45 calendar days of the date of issuance of this notice. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

FRA expects to be able to determine these matters without oral hearing. However, if a specific request for an oral hearing is accompanied by a showing

that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC, on June 17, 1992.  
Phil Olekszyk,

*Deputy Associate Administrator for Safety.*  
[FR Doc. 92-14779 Filed 6-23-92; 8:45 am]

BILLING CODE 4910-06-M

#### National Highway Traffic Safety Administration

[Docket No. 92-30-No.1]

#### Bridgestone/Firestone, Inc.; Receipt of Petition for Determination of Inconsequential Noncompliance

Bridgestone/Firestone, Inc., (Bridgestone/Firestone) of Akron, Ohio, has determined that some of its tires fail to comply with 49 CFR 571.109, "New Pneumatic Tires," (Federal Motor Vehicle Safety Standard (FMVSS) No. 109), and has filed an appropriate report pursuant to 49 CFR part 573. Bridgestone/Firestone has also petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) on the basis that the noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of a petition is published under section 157 of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1417) and does not represent any agency decision or other exercise of judgement concerning the merits of the petition.

During the period of February 26, 1991 through April 24, 1991, Bridgestone/Firestone manufactured 7,259 tires, designated P215/70R14 FR480 W2HY FR5 081 thru 161, that bear incorrect serial information. The information should read P215/70R14 FR480 W2HY FR5 081 thru 161, however the "2" in "W2HY" was omitted on the subject tires. The missing "2" is part of an identification code which identifies Bridgestone/Firestone as the manufacturer of the tire. The noncompliance resulted when an error was made during the manufacturing of the serial marker.

Section S4.3 specifies that each tire be labeled with the name of the manufacturer or brand name, and number assigned to the manufacturer in the manner specified in Part 574.

Bridgestone/Firestone supports its petition for inconsequential noncompliance with the following:

All tires manufactured in the affected size/type meet all requirements of Standard #109

except label requirements pertaining to S4.3.3.

If there would be need for the consumer or manufacturer representative to read the serial, sufficient information exists to define the manufacturing location as Bridgestone/Firestone, Inc., Wilson, North Carolina.

Interested persons are invited to submit written data, views, and arguments on the petition of Bridgestone/Firestone, described above. Comments should refer to the Docket Number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC, 20590. It is requested but not required that six copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, the Notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: July 24, 1992.

(15 U.S.C. 1417; delegation of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on: June 17, 1992.

Barry Felrice,

*Associate Administrator for Rulemaking*  
[FR Doc. 92-14778 Filed 6-23-92; 8:45 am]

BILLING CODE 4910-59-M

[Docket No. 92-02; Notice 2]

#### Determination That Nonconforming 1989 Mercedes Benz 200E Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Notice of determination by NHTSA that nonconforming 1989 Mercedes Benz 200E passenger cars are eligible for importation.

**SUMMARY:** This notice announces the determination by NHTSA that 1989 Mercedes Benz 200E (Model ID 124.021) passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the 1989 Mercedes Benz 260E, Model ID 124.026), and they are capable of being



readily modified to conform to the standards.

**DATES:** The determination is effective as of June 24, 1992.

**FOR FURTHER INFORMATION CONTACT:**

Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

**SUPPLEMENTARY INFORMATION:**

**Background**

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that

"(I) the motor vehicle is \* \* \* substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year \* \* \* as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards \* \* \*."

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the Federal Register of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the Federal Register.

G&K Automotive Conversion, Inc. of Anaheim, California (Registered Importer No. R-90-007), petitioned NHTSA to determine whether 1989 Mercedes Benz 200E passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on March 31, 1992 (57 FR 10946), to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition. No comments were received in response to the notice. Based on its review of the information submitted by the petitioner, NHTSA has determined to grant the petition.

**Vehicle Eligibility Number for Subject Vehicles**

The importer of a vehicle admissible under any final determination must

indicate on the form HS-7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP # 11 is the vehicle eligibility number assigned to vehicles admissible under this notice of final determination.

**Final Determination**

Accordingly, on the basis of the foregoing, NHTSA hereby determines that a 1989 Mercedes Benz 200E (Model ID 124.021) is substantially similar to a 1989 Mercedes Benz 260E (Model ID 124.026) originally manufactured for importation into and sale in the United States and certified under section 114 of the National Traffic and Motor Vehicle Safety Act, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

**Authority:** 15 U.S.C. 1397(c)(3)(A)(i)(I) and (C)(iii); 49 CFR 593.8; delegation of authority at 49 CFR 1.50 and 501.8.

Issued on: June 19, 1992.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 92-14858 Filed 6-23-92; 8:45 am]

BILLING CODE 4910-59-M

**Research and Special Programs Administration**

[Docket No. WPD-1]

**Waiver of Preemption Determination No. 1 (WPD-1), City of New York; Application for Waiver of Preemption as to Fire Department Regulations Concerning Pickup/Delivery Transportation of Flammable and Combustible Liquids and Flammable and Combustible Gases**

**AGENCY:** Research and Special Programs Administration (RSPA), Transportation.

**ACTION:** Waiver of Preemption Determination No. 1 (WPD-1); correction.

**SUMMARY:** RSPA is correcting errors in the text of WPD-1, concerning City of New York Fire Department regulations governing trucks that pick up or deliver flammable and combustible liquids and gases in New York City, which was published in the Federal Register on June 2, 1992 (57 FR 23278).

**FOR FURTHER INFORMATION CONTACT:** Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001 (Tel. No. 202-366-4400).

**Corrections to WPD-1**

1. On page 23280, in the first column, in the last paragraph beginning "The City's requirements at issue \* \* \*" the case number of *National Paint & Coatings Ass'n, Inc. v. City of New York* in the ninth line should read "No. CV-84-4525 (ERK)."

2. On page 23281, in the third column, in the second to last paragraph beginning "Trucks built to MC-306 \* \* \*" the citation "*Id.*" in the fifth line should read "NYC Appl. 14."

3. On page 23283, in the first column, in the second full paragraph beginning "Until recently, \* \* \*" the words "it its" in the third line should read "if its."

4. On page 23283, in the third column, in the second full paragraph beginning "With regard \* \* \*" the word "majority" in the first line should read "minority."

5. On page 23284, in the second column, in the first full paragraph beginning "The City's Exhibit 35, \* \* \*" the word "result" in the fifth line should read "results."

6. On page 23284, in the second column, in the last paragraph beginning "Opponents of the City's application \* \* \*" the words "fewer" (three times) and "less" in the quotation from Mobil's comments in the fifth and sixth lines should be emphasized (by underlining or italics).

7. On page 23284, in the third column, the third indented paragraph is corrected by inserting the words "hazardous materials, when the" after the word "carrying" in the second line.

8. On page 23285, in the first column, in the second full paragraph beginning "Matack alleges \* \* \*" the abbreviation "TUA" in the eighth line should read "UTA."

9. On page 23286, in the first column, in the carryover paragraph the word "while" in the sixth line should read "which."

10. On page 23287, in the first column, in the first full paragraph beginning "Addressing the City's argument \* \* \*" the word "state" in the fifth line should read "states."

11. On page 23287, in the first column, in the last full paragraph beginning "In their letter \* \* \*" after the words "the very" in the third line insert "next."

12. On page 23287, in the third column, in the last paragraph beginning "These and the other \* \* \*" delete the word "a" in the sixth line.

13. On page 23288, in the second column, in the last full paragraph beginning "e. Finding on level of protection \* \* \*" the figures "40-59%" "



in the next to the last line should read "40-50%."

14. On page 23294, in the third column, in the last full paragraph beginning "On the other hand, \* \* \*" insert "FR" after "54" in the fifth line and change the word "trucks" in the seventh line to read "truck's."

15. On page 23295, in the second column, in the second full paragraph beginning "A. A waiver of preemption \* \* \*" the word "reason" in the fourth line should read "reasons."

Issued in Washington, DC on June 18, 1992.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 92-14821 Filed 6-23-92; 8:45 am]

BILLING CODE 4910-60-M

## DEPARTMENT OF THE TREASURY

### Public Information Collection Requirements Submitted to OMB for Review

Dated: June 17, 1992.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

#### Internal Revenue Service

OMB Number: 1545-0129.

Form Number: IRS Form 1120-POL.

Type of Review: Extension.

Title: U.S. Income Tax Return for Certain Political Organization.

Description: Certain political organizations file Form 1120-POL to report the tax imposed by section 527. The form is used to designate a principal business campaign committee that is subject to a lower rate of tax under section 527(h). IRS uses Form 1120-POL to determine if the proper tax was paid.

Respondents: Non-profit institutions, Small businesses or organizations.

Estimated Number of Respondents/Recordkeepers: 6,527.

### Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping .....	14 hours, 35 minutes.
Learning about the law or the form.	6 hours, 23 minutes.
Preparing the form .....	15 hours, 17 minutes.
Copying, assembling, and sending the form to IRS.	2 hours, 23 minutes.

### Frequency of Response: Annually

### Estimated Total Reporting/

Recordkeeping Burden: 252,530 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

Departmental Reports Management Officer.

[FR Doc. 92-14812 Filed 6-23-92; 8:45 am]

BILLING CODE 4830-01-M

### Public Information Collection Requirements Submitted to OMB for Review

Dated: June 17, 1992.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

#### Internal Revenue Service

OMB Number: 1545-1033.

Form Number: IRS Form 8453-E.

Type of Review: Extension.

Title: Employee Benefit Plan Declaration and Signature for Electronic/Magnetic Media Filing.

Description: This form will be used to secure taxpayer signatures and declarations in conjunction with the Electronic Filing of Forms 5500, 5500-C/R, and 5500EZ. These forms, together with the electronic transmission, will comprise the annual information returns.

Respondents: Individuals or households, Businesses or other for-profit.

### Estimated Number of Respondents/Recordkeepers: 50,000.

### Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping .....	7 minutes.
Learning about the law or the form.	2 minutes.
Preparing the form .....	20 minutes.
Copying, assembling, and sending the form to IRS.	20 minutes.

### Frequency of Response: Annually.

### Estimated Total Reporting/

Recordkeeping Burden: 41,000 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Dale A. Morgan,

Departmental Reports Management Officer.

[FR Doc. 92-14813 Filed 6-23-92; 8:45 am]

BILLING CODE 4830-01-M

## DEPARTMENT OF VETERANS AFFAIRS

### Veterans Benefits Administration

### Opportunity for Readjudication of Certain Ionizing Radiation Claims

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Notice is hereby given of the opportunity for readjudication of certain claims for service-connected disability or death benefits based on alleged ionizing radiation exposure in military service resulting from atomic weapons testing or the atomic bombing of Hiroshima or Nagasaki, Japan. This opportunity for readjudication is made pursuant to an order of the court in *National Association of Radiation Survivors v. Derwinski*, No. C-83-1861-MHP (N.D. Cal.) and is intended to redress the effects of the attorney fee limitation challenged in the lawsuit, Public Law 85-857, sections 3404, 3405, 72 Stat. 1238-39 (formerly codified at 38 U.S.C. 3404, 3405), which the Court found unconstitutional as applied to certain individuals. This opportunity is available only to class members in this case who elect to have their claims adjudicated with the assistance of an attorney who is a member in good standing of the bar of the State where he or she practices.



**DATES:** Requests for readjudication of the affected claims must be received by the Department of Veterans Affairs (VA) before June 25, 1993.

**FOR FURTHER INFORMATION CONTACT:** Steven Thornberry, Consultant, Regulations Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 233-3005.

**SUPPLEMENTARY INFORMATION:** In order to redress the effects of the past application of the attorney fee limitation challenged in the *NARS* lawsuit, VA has been ordered to offer certain class members a one-year period beginning June 24, 1992, in which to request a readjudication of their claims with the assistance of an attorney.

The class consists of claimants who have or have had a claim pending before the VA for service-connected disability and death benefits based on alleged ionizing radiation exposure in military service resulting from atomic weapons testing or the atomic bombing of Hiroshima or Nagasaki, Japan.

The following claimants with ionizing radiation claims are not eligible to take advantage of this opportunity for readjudication: (1) Those whose claims fall under the Judicial Review Act of 1988; (2) those who received or in the

future receive a lump sum payment under the Radiation Exposure Compensation Act, Public Law 101-426; and (3) those who have received or have been determined by VA to be eligible for presumptive benefits under the Radiation-Exposed Veterans' Compensation Act of 1988, Public Law 100-321.

Any person with a claim for service-connected death or disability benefits based upon exposure to ionizing radiation may request readjudication by sending a written request to the VA regional office having jurisdiction of his or her claims file, or to the office that made the prior decision on the claim. Upon receipt of the written request, VA will examine the records for the purpose of determining eligibility for a readjudication. Claimants found eligible will be notified that they and their attorneys may proceed to have their prior claim readjudicated based on the evidence in the present record, as well as any additional evidence the claimant wishes to submit. In order to receive this readjudication, the written request must be received by VA before June 25, 1993. If successful on a readjudicated claim, a veteran would be entitled to benefits dating from his first claim for disability or death compensation concerning a disease which resulted from his

exposure to radiation during the atmospheric nuclear tests or the occupation of Hiroshima or Nagasaki, or the date upon which his radiogenic disease became manifest, whichever came later. Claimants eligible to take advantage of this opportunity may make any arrangement for payment of fees to their attorney, up to the time when a decision of the Board of Veterans Appeals on the readjudicated claim becomes final. After that time, the fee arrangement that a claimant may make with the attorney will be governed by the Veterans' Judicial Review Act, Public Law 100-687, section 104, 102 Stat. 4108 (1988).

VA has identified claimants potentially eligible for readjudication through the Special Issues Rating System (SIRS), the Pending Issue File (PIF), and a separate database maintained by the Board of Veterans Appeals. It has sent a notification to the last known address of each person identified. The purpose of this notice is to inform those individuals who do not receive notice through the mail of VA's offer.

Dated: June 17, 1992.

Edward J. Derwinski,  
*Secretary of Veterans Affairs.*  
[FR Doc. 92-14805 Filed 6-23-92; 8:45 am]

BILLING CODE 8320-01-M



The American Medical Association is a non-profit corporation organized for the purpose of promoting the interests of the medical profession and the public. It was organized in 1847 and has since that time been the leading organization of the medical profession in the United States. The Association is composed of more than 50,000 members, who are physicians, surgeons, dentists, and other medical practitioners. The Association's principal activities are the publication of the Journal of the American Medical Association, the holding of annual conventions, and the representation of the medical profession in legislative and executive bodies. The Association is also engaged in a wide variety of other activities, including the promotion of medical research, the improvement of medical education, and the advancement of the public health. The Association's efforts have been instrumental in the development of the medical profession in the United States, and it continues to play a leading role in the advancement of medicine and the improvement of the health of the people.

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# **federal register**

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**Wednesday  
June 24, 1992**

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## **Part II**

### **Department of Housing and Urban Development**

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**Office of the Assistant Secretary**

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**24 CFR Parts 905 and 965  
Indian Housing: Revised Consolidated  
Program Regulations; Rule**



DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENTOffice of the Assistant Secretary for  
Public and Indian Housing

24 CFR Parts 905 and 965

[Docket No. R-92-1371; FR-2208-F-04]

RIN 2577-AA32

Indian Housing: Revised Consolidated  
Program RegulationsAGENCY: Office of the Assistant  
Secretary for Public and Indian Housing,  
HUD.

ACTION: Final rule.

**SUMMARY:** This final rule modifies slightly the interim rule now in effect that consolidated rules applicable to all aspects of the Indian housing programs administered by Indian Housing Authorities (IHAs). It includes changes to rules governing the public and Indian housing programs, generally, that have been made effective in rulemakings published since the interim rule was published. This final rule is needed to respond to comments received on the interim rule and to correct omissions of certain pertinent provisions of the HUD rules governing public and Indian housing programs generally.

EFFECTIVE DATE: October 1, 1992.

**FOR FURTHER INFORMATION CONTACT:** Dominic Nessi, Director, Office of Indian Housing, Room 4140, Department of Housing and Urban Development, Washington, DC 20410; telephone (202) 708-1015 (voice), or (202) 708-0850 (TDD). (These are not toll-free numbers.)

## SUPPLEMENTARY INFORMATION:

## I. Paperwork Reduction Act Statement

The following information collection requirements in this rule were approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 under the stated approval numbers:

Rule section	Approval no.
905.220(a), 407(a).....	2577-0030
905.240, 245(b).....	2577-0031
905.509 (g) & (h).....	2577-0114
905.555.....	2577-0090
905.260(f)(3).....	2577-0021
905.275.....	2577-0033
905.301.....	2577-0063
905.340(a).....	2577-0006
905.345(d), 428(c).....	2577-0114
905.360.....	2577-0130
905.416.....	2577-0003
905.555, 570, 575.....	2577-0090
905.570(e), 575.....	2577-0090
905.603.....	2577-0024
905.618(b).....	2577-0048

Rule section	Approval no.
905.624, 627.....	2577-0048
905.642.....	2577-0104
905.648.....	2577-0044
905.715-730.....	2577-0029
905.964, 965.....	2577-0062

The following information collection requirements in this rule are being submitted to OMB for review under the Paperwork Reduction Act of 1980. Pending approval of these information collections by OMB and the assignment of an OMB control number, no person may be subjected to a penalty for failure to comply with these collections: §§ 905.140(c)(i), 905.160(a)(3)(ii), 905.165, 905.225(a), 905.260(f)(2), 905.325, 905.434(b)(1), 905.523, 905.618(c) & (j), 905.639, 905.645, 905.654, 905.745, 905.755, 905.770, 905.931, 905.937, 905.964, and 905.965. Upon approval by OMB, a notice containing the approval numbers will be published in the **Federal Register**.

## II. Background

Enactment of the Indian Housing Act of 1988 (Pub. L. 100-358, 102 Stat. 676) underscored the need for this separate comprehensive rule applicable to Indian housing. The Indian Housing Act of 1988 created a separate title II of the United States Housing Act of 1937 (42 U.S.C. 1437aa) applicable to Indian housing and provided that changes to the existing title would not automatically apply to Indian housing. It also provided that the Indian housing program is to be administered in accordance with regulations issued under notice and comment rulemaking procedures, in consultation with Indian housing authorities. The regulations affecting Indian housing that have not been consolidated in part 905 are those found in title 24 CFR chapters I, VII and XII, and in part 961 (grants for drug elimination in public and Indian housing programs).

This rule was preceded by a proposed rule, published on June 29, 1988 (53 FR 24554), and an interim rule, published on June 18, 1990 (55 FR 24722). The Department received forty-three public comments in response to publication of the interim rule during the comment period. Of these, all were from IHAs except for two, which were from IHA consultants. There were six additional comments submitted by IHAs after the close of the comment period.

This rule responds to the public comments received on the interim rule. It also includes changes based on other intervening rules and changes that the Department has determined are

necessary to complete the separation of the Indian housing regulations from the public housing regulations.

## III. Description of Changes

## A. Subpart A—General

## Definitions (Section 905.102)

A number of comments were received related to the definition of adjusted income. They include suggestions to increase the deduction to \$1,000 for each dependent, allow participants to claim both child care and excessive travel expenses, redefine the term "annual income" to reflect net income rather than gross income minus deductions, equate the deduction to those used by the Internal Revenue Service and eliminate child support payments from the calculation of gross income.

These issues were previously addressed in the preamble of the interim Indian Housing rule published on June 18, 1990. At the time, the Department stated that Congress had expressly adopted the approach of allowing certain specified deductions from gross income in its formulation of the income based rents and homebuyer payments. Since the definition of adjusted income is specified by statute, HUD is not free to make this type of change without a legislative amendment.

One commenter asked that the definition of elderly be lowered from age 62 to 55. This comment is identical to one received on the proposed rule. Our answer must be the same: The definition is a statutory one and legislative action would be required in order for the rule to be changed.

It was suggested that definitions should be added for the terms sporadic income, payment in lieu of taxes (PILOT), principal residence, cooperation agreement, latent defect and high risk. We have added definitions for PILOT, cooperation agreement and latent defect. High risk is already defined in the rule. Sporadic income and principal residence are defined by the Indian housing authority in its admission and occupancy policy.

A number of respondents requested that the term "HUD" refer to the Office of Indian Programs (OIPs) unless otherwise stated. In developing this rule, the Department has attempted to be as specific as possible in specifying organizational levels. We also have added additional clarification on the relationship of the Regional Administrator to the OIPs.

Commenters recommended that the definition of an Indian area should be broadened, to permit Tribes to develop housing units off-reservation. The



Department allows an IHA to develop units wherever it has the authority to fully operate the program, so the Department believes that no change to the regulation is necessary.

A number of comments were received requesting changes in the definition of the Comprehensive Improvement Assistance Program. These changes have been considered and were addressed in the final CIAP subpart I/ Comprehensive Grant program rule issued separately.

Comments were received on the interim rule, as on the proposed rule, suggesting changes in the definition of net family assets. We note that this definition, as other definitions related to income, follow the same language as those applicable to most of HUD's assisted housing programs (under both the U.S. Housing Act of 1937 and certain provisions of the National Housing Act). Changes in these definitions require consultation with the Department of Agriculture, in accordance with statutory directive, since that agency is required to follow HUD's definition of income (and related definitions). Therefore, any significant change to these definitions would require action to amend regulations for several programs.

Comments were received requesting that basic telephone service for elderly residents be included in the definition of utility for the purposes of providing a deduction. The Department has reviewed this request and has determined that at this time it does not wish to change the definition of basic utilities without greater study as to the financial and practical implications.

*Assistance From Indian Health Service and Bureau of Indian Affairs (Section 905.110)*

It was suggested that HUD clarify its position as the lead agency under the Interdepartmental Agreement. Language has been added to further clarify this relationship. The final rule states that HUD will take the lead in promoting inter-agency cooperation and communication.

*Applicability of Civil Rights Requirements (Section 905.115)*

A number of comments were received asking for changes in HUD's references to the Indian Civil Rights Act, as well as other Federal fair housing laws. It is the Department's position that the current statement of applicability in the interim rule is correct and is necessary to address issues arising anywhere in Indian country. Therefore, the final rule retains the same provisions.

*Compliance With Other Federal Requirements (Section 905.120)*

Comments were received requesting a waiver from Davis-Bacon wage rate requirements. This is a statutory requirement and no change can be made in the regulation without legislative action.

*Establishment of IHAs by Tribal Ordinance (Section 905.126)*

Comments were received on both sides of the issue of whether or not to include the Tribal ordinance in the rule. Its omission from the interim rule was criticized as a method to make HUD changes to it easier. The Department believes that any change to the ordinance should be subject to public comment. Therefore, it has been included as appendix I to subpart A of this final rule, making the rule as comprehensive as possible.

It was suggested that HUD only be required to approve ordinances for IHAs which are seeking HUD assistance. The Department agrees with this statement and believes that no change is required to the current ordinance or regulations to permit this.

*IHA Commissioners Who Are Tenants or Homebuyers (Section 905.130)*

There were numerous comments on the ability of commissioners to serve as employees under extremely unusual circumstances with HUD approval. Some commenters felt that HUD should not have to approve such an arrangement. Others believed that commissioners should not be able to serve as employees and commissioners at the same time. Since there was no clear statement on either side, the Department chooses to leave the current language, although one change has been made to allow the HUD field office to make the approval. This system allows for sufficient IHA flexibility.

A similar comment requested that HUD prohibit board members from participating in official actions if they are not in compliance with outstanding policies and program requirements. While the Department is concerned that any Board member would violate program requirements that the Board has been selected to uphold, it believes it is unnecessary to add a provision to the regulations on this issue. The Tribal Ordinance provides a basis for removing a Board member for cause.

*Administrative Capability (Section 905.135)*

A number of comments were received on the administrative capability section asking for greater clarification of the

definition of capacity, for discontinuation of the term "high-risk", for elimination of the subjectivity found in the current definition, and for greater specificity on the appeals process. This section has been revised. The Department believes that the interim rule may have disqualified for funding some IHAs whose administrative deficiencies were not sufficiently serious to warrant it. Therefore, this final rule makes it clear that a "high-risk" IHA may be eligible for funding, but with limitations. The use of the term "high-risk" is required by 24 CFR 85.12 and cannot be eliminated. In addition, the appeals process was clarified to state the exact number of days permitted for appeals.

*Certification of Housing Managers (Section 905.140)*

Comments were received requesting the Department to allow for Indian preference for approved certifying organizations. The Department feels it is unnecessary to award a preference because it is possible to have more than one approved certifying organization, and housing authorities seeking certification have the choice to utilize any organization they wish.

One commenter asked that the term "national" be removed from the requirement that a certifying organization be a "national housing management organization". This suggestion was adopted. Another commenter requested that only the certifying organization or its successor—and not HUD—have the authority to revoke or suspend certification (under paragraph (h)). The Department agrees that, in most cases, the certifying organization should be the entity to determine when to revoke or suspend certification. However, there may be circumstances where HUD must act, such as when the certifying organization or its successor no longer exists. The rule has been modified to clarify this intent.

Other comments included expanding certification to cover other activities such as maintenance and financial administration, adding a process for "third-party" appeals and a more frequent review of certifying organizations. The Department believes that the current process is working reasonably well and that no such changes are necessary at this time.

*B. Subpart B—Procurement*

Numerous commenters commended the Department on the inclusion of procurement as a subpart in the regulations. In addition, many requested



that model policies and a procurement handbook be developed. The Department agrees. A model policy has been developed and issued (Notice 91-0005 ADM, May 23, 1991) and a handbook is under development.

In addition, comments were received regarding the number of days required for certain actions. It was requested that the regulations specifically state whether they are calendar or working days. The Department has made the change to specify calendar days.

#### *Indian Preference (Section 905.165)*

A commenter stated that HUD needs to address the issue of whether or not section 7(b) of the Indian Self-Determination and Education Assistance Act overrules local Tribal preference or not. The Act does not permit Tribal preference with respect to use of Federal funds. Therefore, IHAs and Tribal governments may not use local Tribal preferences with respect to the Indian housing program.

A commenter asked why, since HUD requires Indian preference of its grantees and sub-grantees, it does not require Indian preference in the hiring of its own personnel. The commenter reasoned that since title II of the United States Housing Act of 1937 officially authorized the Indian housing program, there should be a HUD hiring preference in favor of Indians. There is no statutory authority for HUD to give such a preference. The Department cannot administratively assume such authority.

A commenter asked that in § 905.165(b)(2) we delete the last part of the sentence that requires that the IHA submit the documentation to HUD within 20 days, as well as retain it in its files for HUD review for three years. They reasoned that since HUD may review copies held by an IHA at any time, the requirement to copy the HUD office appears burdensome. The Department agrees and the change has been made.

A commenter objected to the requirement of § 905.165(c)(4) that advertisements for bids or proposals either include the locally-imposed preference requirements or that the advertisement refer prospective bidders to the Tribal governing body for information about the preference requirements. The suggestion that local preferences not be included in the advertisement but be available from the Tribal governing body is included so that an IHA need not insert the lengthy preference provisions in its advertisement. No change has been made.

A comment was received that there is still a need for a stronger introductory

statement about disapproving "fronts"—entities that purport to be eligible for Indian preference but are not. Clearly, IHAs should not allow ineligible bidders to receive Indian preference. The Department believes that the regulations are not the place for such statements, but plans to issue a notice addressing this issue.

Commenters recommended that the regulation (§ 905.165(f)) should contain provisions for Indian preference protests to be heard by the Tribal procedure if and when an appropriate forum exists. The Department disagrees. HUD has an interest in ensuring that Indian preference is administered according to Federal laws, and this can best be achieved if we remain in the appeals process. No change has been made to the regulation.

#### *Bonding Requirements Applicable to Development Contracts (Section 905.170)*

Since the procurement subpart now applies to all contracts, commenters suggested that there is a need to distinguish, for performance and payment assurance purposes, between small construction contracts, large construction contracts, and non-construction contracts. It was recommended that HUD should not require formal "performance and payment assurances" for construction contracts under \$50,000 and for most non-construction contracts.

The Department agrees with the thrust of this comment. This section of the subpart applies only to "development contracts", and a similar requirement is found in the modernization subpart, applicable to rehabilitation contracts. Therefore, non-construction contracts are not covered.

With respect to the size of the contracts covered, however, this provision was not adequate. Part 85 requires bonding only for contracts of \$100,000 or more, and this section has now been modified to follow that provision.

#### *Wage Rates (Section 905.172)*

Many comments were received advocating changes in the applicable wage rates that would require statutory changes. The rule cannot be changed in any significant way under current law.

#### *Methods of Procurement (Section 905.175)*

A recommendation was made that in § 905.175(a)(2)(iii) the automatic rejection of a bid or proposal lacking the statement about how Indian preference is to be provided in the award of subcontracts be changed. The rule could

provide that the IHA give the proposer an opportunity to submit the statement later, to avoid disqualification. The Department agrees with this recommendation for Invitations for Bids (IFBs) and Requests for Proposals (RFPs) only in limited circumstances. The rule has been revised to permit later submission only where the statement had been prepared in time and only when it is submitted within five days of notification of its omission.

A recommendation was made with respect to small purchase procedures (paragraph (b)(3)). For contracts and purchases under \$250, it was suggested that quotes and competitive awards should not be required. A similar comment asked that the requirement for small purchases be similar to those in public housing.

The Department has revised the rule to eliminate the procedure for purchases under \$2,000. The procedures for purchases under \$25,000 permit solicitation of quotations instead of sealed bids or competitive proposals. In combination with the provision permitting sole source procurement under certain circumstances, this procedure provides sufficient flexibility to eliminate the need for a separate provision for purchases under \$2,000, or some smaller amount.

A commenter stated that, in the sealed bidding procedure (§ 905.175(c)), single bids should be allowed to be accepted if the IHA determines that the bid was competitive without any requirement that "unusual circumstances" be present. The Department agrees that the failure of sealed bidding to produce more than one bid is a sufficiently unusual circumstance under § 85.36(d)(4)(i) to warrant HUD authorization of acceptance of the bid. Therefore, this provision recognizes the acceptability of such a procedure where the IHA determines that the bid is a reasonable price, or the IHA determines that delays caused by re-advertising would result in higher costs without requiring demonstration of any "unusual circumstances."

#### *C. Subpart C—Development*

##### *Roles and Responsibilities of Federal Agencies (Section 905.201)*

Comments varied on whether or not to include the Interdepartmental Agreement as an appendix in the rule. The majority of comments urged removal of the Agreement in order to expedite changes as necessary. The Department agrees with this position and has removed the Agreement. Other



comments expressed the concern that the Agreement is out of date and needs to be revised. HUD agrees and will make an effort to forge a new agreement with all federal agencies involved in the development process.

#### *Allocation (Section 905.205)*

One comment advocated allocation of new funding based on both need and performance. Over the years, Tribal organizations have repeatedly requested that new funding allocations to HUD regions be based solely on need. At present, we feel no need to change this practice.

One commenter contended that HUD fails to take actual need into account in allocating funds, as required by the HUD Reform Act of 1989. This commenter also stated that Tribes should have an opportunity to obtain and use census data in order to show need, and that HUD should establish a specific program to deal with inadequate BIA assessments of need. (The Consolidated Need Assessment compiled by the Bureau of Indian Affairs is completed and signed by Tribal governments. HUD believes that this reporting process would be more meaningful if each Tribal government worked closely with the BIA to insure that the data submitted accurately reflects its housing needs.) The current rule does not require that the BIA data be used, and Tribes may submit verifiable housing need data compiled using acceptable sampling techniques.

In the interests of a truly comprehensive part 905, it was recommended that the allocation regulation found at 24 CFR part 791, subpart D, be replicated in this rule. It is noted that chapter VII (the 700 series) rules apply by their terms to programs of both the Assistant Secretary for Housing and the Assistant Secretary for Public and Indian Housing. Neither the allocation rule nor the Social Security Number disclosure rule (part 750) is replicated in this rule. The intent of this rule is to consolidate all provisions from chapter IX (the 900 series), issued under the authority of the Assistant Secretary for Public and Indian Housing, that apply to Indian housing programs. The Department believes that the rules in chapter VII affecting more than the Indian housing programs are accessible and suggests the commenter refer to that chapter of the regulations as necessary.

#### *Production Methods and Requirements (Section 905.215)*

A number of comments were received regarding the statutory requirement for acquisition rather than new construction as the preferred development method for

new Indian housing units. Any change to this provision would require legislative action. Other comments objected to the preference for large family units over smaller units. This is no longer statutorily required, because of a revision to the 1937 Act by the Cranston-Gonzalez National Affordable Housing Act. Therefore, the Department has deleted this requirement.

A number of commenters stated that it is still unclear whether all preference requirements have to be listed in the bidding advertisement or simply in the bidding documents. Their concern is that to list all regulations in the advertisement is unworkable, expensive and unnecessary. The Department agrees and has revised the rule, in paragraph (b), to state that the advertisement must include language stating the general requirement for Indian preference and to permit the specific regulation to be placed in the bid documents.

The Department disagrees with the comment that stated that the change to permit the HUD field office to determine the financial capability of the IHA or Tribe to provide adequate security on all force account projects (paragraph (a)(6)) would prolong the development process. In the past, this authority was in Headquarters and required an additional approval from the Assistant Secretary. The ability of the HUD field office to make this determination will reduce the time.

#### *Application Procedures (Section 905.220)*

One commenter wrote that the regulations do not address the concept of an umbrella housing authority and how its application is to be handled. The concern is that one reservation should not be penalized for another reservation's failure to comply with the Tribal ordinances and/or HUD regulations. We agree and have modified the rule to include more specific instruction on how umbrella IHAs are to be treated. However, all Tribes within an umbrella housing authority are responsible for the actions of the IHA itself and should be aware that non-performance by the IHA could have a negative impact on its respective housing programs.

The language of the interim rule states that HUD will "begin review" of the application within 30 calendar days. It was recommended that HUD be required to complete all actions within 30 days, not just begin the review. The Department agrees that 30 days is excessive and has reduced that time period to 14 calendar days. The Department is making every effort to

substantially reduce the time needed not only to complete the review but also to award funding. These timeframes will be published annually in the Notice of Fund Availability (NOFA).

A commenter asked that those IHAs with successful appeals be given first priority for units in the subsequent fiscal year. The Department agrees, and that change was implemented in the Fiscal Year 1991 processing Notice.

A commenter recommended that scoring of an IHA application should be adjusted not only for an IHA that has no previous funding but also for an IHA that has not received funding in the past five to ten years. We believe that the current process gives a significant advantage to IHAs that have not received funding over a long period of time and no revision is necessary. However, it should be noted that the precise method for awarding points has been removed from the rule, because the Department wants to retain the ability to be responsive to changes from year to year. The method for awarding points will be published annually in the NOFA.

A commenter stated that the relative occupancy rate should be adjusted to accommodate situations in which the admissions and eligibility requirements prevent full occupancy. The Department's position remains the same: if a housing authority cannot achieve a high level of occupancy for any reason, it should have less priority for units.

Comments were received regarding the loss of four points for projects not meeting HUD requirements for processing or contract administration. The concern expressed was that some IHAs split projects for a variety of reasons which could adversely affect their ratings. The Department recognizes this concern. The number of points lost for this weakness may not always be the same. However, the Department does believe that prompt processing and contract administration are important.

A commenter expressed concern that the factor related to the length of time since the IHA was last funded will penalize IHAs that had received funding in the prior fiscal year. It is the Department's intent to give ample opportunity for funding to all eligible IHAs. This factor was designed for this purpose and will remain the same.

A number of commenters disagreed with the deletion of the appeal process when an application is not funded at the level requested or denied. The Department believes that it is inappropriate to require HUD justification for fund awards below the amount requested or a denial (which is based on a low point score). However,



the final rule does include an appeal for IHAs that believe that a mistake has been made in the rating and ranking process.

Commenters suggested that the ACC to cover initial costs be executed for up to ten percent. The rule states that typically three percent will be used, but if an IHA has unusual circumstances, a higher figure may be chosen. The Department believes this is sufficient to meet the commenters' concern.

A commenter suggested that one percent of the funds approved in each development program should be used to develop a master plan of the housing authority's service area or reservation which would include roads and sanitary sewer needs. It was stated that this long range planning would improve the development process and aid in the coordination of services between the agencies involved in the development process such as the BIA, IHS and the Tribes. The Department agrees and has included a provision (a new paragraph (f)) permitting up to one percent of approved funding for a project to be used for planning by IHAs.

#### *IHA Development Program (Section 905.225)*

The rule has provided that a complete development program be submitted to HUD within one year of the program reservation date. Because circumstances vary considerably, this deadline has not always been practical. Therefore, the language has been changed to provide that at the project coordination meeting, the IHA and HUD will establish a target date for submission of the complete development program.

A commenter asked that the language regarding the requirement for beginning construction within 30 months except for unusual circumstances be consistent throughout the regulation. We agree with this comment and the revision has been made. Similarly, a commenter suggested that the language should reflect more closely the statutory language governing construction starts. This change also was made.

Two commenters disagreed with the requirement that two public meetings be held and suggested that it be limited to one. While the Department believes that significant input from the public is important, this section has been revised to permit a single meeting.

#### *Site Selection Criteria (Section 905.230)*

A commenter requested that the regulation be revised to state that the applicable Tribal plan should take precedence over the local and/or regional plans on land use. The regulation has not been changed to

reflect this request because there is generally no conflict. If a particular Tribal ordinance requires that Tribal plans have precedence, then the IHA must follow that requirement.

A commenter wrote that a major problem in site selection is the requirement that sites be near established highways, sewer systems, or power lines. The regulation should take into account the IHA option of allowing Indian families to continue utilizing primitive road access and to permit the use of alternative energy and sewer systems. The regulation requires access roads to the individual homesites, but does not require them to be "highways." The rule requires access to utilities, including adequate water and sanitation facilities, but does not specify sewer systems or power lines. No change has been made.

A commenter asked that the section requiring written assurance from BIA before final approval that a valid lease will be executed should be deleted, because it appears to be unnecessary and creates additional paperwork. The Department disagrees with the comment. This requirement permits the flexibility for IHAs to continue processing based on BIA assurance of lease approval rather than awaiting full approval of leases. The Department cannot allow construction without at least this assurance.

A commenter stated that a funding source needs to be set up to reasonably compensate the landowners who relinquish their land rights to the IHA for housing development. Readily available land will speed up the development process greatly. The rule does not affect an IHA's ability to compensate landowners. No change has been made.

#### *Appraisals (Section 905.240)*

Opposition was expressed to the requirement for appraisals on Indian trust land on the basis that they are unnecessary and costly in time and money. The commenter said that Tribal trust land should be presumed to cost \$1,500, the parcels should be uniform in size, and each lot should be no less than ½ acre per individual lot, to allow a homebuyer the opportunity for landscaping and privacy.

The regulation already sets out the limited conditions under which an appraisal is necessary: when the cost of the site is to be charged to the IHA's development cost, and either it is not donated trust land or the IHA determines the value to be more than \$1,500. The IHA can assign a value of up to \$1,500 to a lot on trust land that is donated to the IHA for the project

without an appraisal. Lot sizes are left to the discretion of the IHA and the entity contributing the land.

#### *Design Criteria (Section 905.250)*

A commenter stated that the rule appears not to permit an IHA to adopt its own code or its own modifications to a Tribal building code, and it certainly should. The Department disagrees. IHAs must follow the codes established by the Tribal government where such codes exist.

A comment was received criticizing HUD for suggesting that a model and/or standard house plan be used to establish a maximum cost limitation. The commenter was concerned that HUD would require a house to be limited to a square shaped house. The regulations do not limit design to a square shaped house. The Department encourages native traditional design and construction, as well as other modern design Concepts. It is not embarking on the development of a model housing design.

#### *Total Development Cost Standard (Section 905.255)*

A comment suggested that total development costs be adjusted for remote reservations. That is the current practice for developing the maximum allowable total development cost (TDC).

Comments were received that "HUD makes the determination of the TDC standard on a regular basis, by averaging the current construction costs, as listed by at least two nationally recognized residential construction indices \* \* \*". It was requested that a special provision be made to include the different conditions on Indian reservations. Remoteness and other major factors cause construction costs to be much higher than the standard cost in metropolitan areas.

In developing its TDCs, HUD does modify the national cost indices for these factors. It should be noted that the requirement for national cost indices is statutory.

Comments were received requesting that the previous regulation provisions addressing insurance and counseling be re-instated. This has been done in the final rule by including these costs in the TDC elements in § 905.255.

#### *Construction and Inspections (Section 905.260)*

A commenter asked that the regulation which requires that "maximum consideration shall be given to all homebuyers concerns" be revised to read "may be given". Another commenter asked that participants



"may" be invited to participate in the inspection rather than "shall". The Department disagrees and encourages IHAs to work closely with its participants to avoid future disputes over the quality of housing. It should be noted that the regulation requires only that homebuyers be invited. If the homebuyer chooses not to attend, the IHA may proceed.

A suggestion was made that the modified Turnkey method of construction is not mentioned in this section and should be, as nearly 20% of all HUD Indian projects were developed under that method. Modified Turnkey is now specifically mentioned in § 905.215(a)(3). In addition, HUD will add the term "modified" to the heading of § 905.260(b) to indicate that the language is applicable.

A number of comments were received regarding the correction of construction deficiencies and the liability for paying for those corrections. Some comments agreed with the changes; others were concerned that HUD's liability would be limited. It should be noted that IHAs have the ultimate responsibility for proper construction of housing units. There is no guarantee that funds will be available for litigation or correction of defects. The Department does not indemnify the IHA for correction of deficiencies. The best method of preventing deficiencies is an aggressive inspection procedure by the IHA to address issues before they become problems.

#### *Fiscal Closeout (Section 905.275)*

IHAs should be given a sufficient period of time to close out projects to allow for the correction of deficiencies. There are often deficiencies which are not apparent for long periods of time, such as settlement problems, and the development program should remain open to address them. The Department has administratively determined that 24 months after the date of full availability the actual development cost certificate should be completed. The Department believes that is ample time to find and cure defects.

#### *D. Subpart D—Operation*

In general, this subpart was revised to remove most references to the Mutual Help program and to concentrate its applicability to the rental program and, on some miscellaneous issues, the Turnkey III program. Those references to Mutual Help previously found in subpart D have been moved to subpart E, Mutual Help Homeownership Opportunity Program.

#### *Admission Policies (Section 905.301)*

A commenter stated that it is often difficult for an IHA to follow the requirements to avoid concentrations of deprived families in a project and to have a broad range of incomes, since the Indian Housing Program is a low-income program and is often the major or only housing program on a reservation. These requirements requiring a "broad-range of incomes" are statutory and must be included in the regulation.

A recommendation was received that HUD give the authority to approve changes in local income limits to the local Office of Indian Programs. Although the Department agrees that this could speed up the process, the necessity for coordination with the Department of Agriculture remains and approval authority must be retained in Headquarters.

A recommendation was made that HUD delegate authority for approving an IHA's selection criteria to Tribal governments. The Department is responsible for enforcing federal laws in this area and cannot delegate that responsibility to the Tribal governments.

A number of commenters requested clarification of the statement that criteria for admission "shall not be related to those which may be imputed to a particular group or category of which an applicant may be a member." The Department believes that this language requires a focus on behavior of an individual applicant rather than on group characteristics, and it is necessary for the protection of applicants.

A commenter requested that the IHA not be required to provide notification of the approximate date of occupancy to the applicant at the time the applicant is initially notified of eligibility. This regulatory requirement simply follows a statutory requirement that such notice be given "insofar as such date can be reasonably determined." (Section 6(c)(3) of the 1937 Act, 42 U.S.C. 1437d(c)(3)). Although it is difficult to estimate at times, it is important for the applicant to have some idea as to how long the wait for a unit may be.

#### *Federal Selection Preferences (Section 905.305)*

A number of commenters stated that the federal selection preferences, as nationwide preferences developed primarily for public, non-Indian housing authorities, very often are unsuitable to the unique circumstances in Indian country and the needs of the Tribal communities Indian housing is being constructed to serve. Selection preferences should be established by the Tribal governments serving specific

Indian communities. These governments should not be required to apply a national standard that may conflict with local policies or exclude those most in need of housing assistance within that community. The Department included the federal selection preferences in this rule because they are statutorily required. (Recent amendments to the preference language of the 1937 Act to permit admission of non-federal preference applicants for up to 30 percent of the units were not made applicable to Indian housing. Therefore, that change for public housing is not mirrored in this Indian housing rule.)

Other commenters stated the Mutual Help Program should be excluded from the requirements of federal preferences for admission to HUD-assisted Indian housing, because of their concern that unqualified families or non-Indian families would receive units for which they are not qualified. The Department would like to point out that the language is clear that federal preference does not apply to applicants who would not otherwise be eligible for the program. If the federal preferences, as written, are found unsuitable by an IHA, it is permitted to develop and adopt alternative definitions of the three preferred categories. Alternative definitions, however, must be submitted to and approved by HUD. (See § 905.305(a)(3)). Definition of income; rents and homebuyer payments (§§ 905.315, 905.320).

One commenter stated that the same annual reexamination determination of income should be used throughout the year, in order that the monthly payment determined will remain the same until the next annual re-examination unless a family member loses a job, becomes ill or there are other changes of circumstances. The rule requires that the IHA must determine family income and composition at least once every twelve months and that a participant must comply with the IHA's policy regarding required interim reporting of changes in the family's income. The Department believes these provisions give IHAs adequate flexibility and, therefore, has made no change in the rule in response to this comment.

Many comments were received on changing the definition of annual income. They included a recommendation to use only the head of the household's income; calculate the annual income as the amount "after" payroll deductions; exclude trust income; exclude child support payments; exclude periodic and determinable allowances such as alimony, child support payments and regular



contribution or gifts received from persons not residing in the dwelling; exclude the income of all students, regardless of age; and exclude payments from State governments to the elderly. The definition of annual income used for purposes of Indian housing is the same as the definition used for other programs administered under the United States Housing Act of 1937, which is subject to change only after consultation with the U.S. Department of Agriculture. The definition of adjusted income is statutorily required. The Department will continue to review these comments in the future as revisions to the current system are instituted. However, no changes will be made at this time.

A comment was received that the term "temporarily absent" as related to anticipated sources of income is vague, and needs to be clearly defined. The Department will consider this issue and may provide examples of temporary absence as it revises handbooks to coincide with the publication of the new rule.

Comments were received requesting changes to the ceiling rent calculation and requesting that ceiling rents apply to the Turnkey III and Old Mutual Help programs. Ceiling rents are not the subject of this rule. However, they apply by statute only to Turnkey III contracts executed on or after August 1, 1982, and to the rental program. Based on statutory language, a notice was published at 54 FR 10730 to permit waivers of regulatory provisions to permit them in rental housing. The Turnkey III and Old Mutual Help programs are not included, because the viability of these homeownership programs would be jeopardized by limiting payments by homebuyers in this way.

#### *Total Tenant Payment-Rental and Turnkey III Programs (Section 905.325)*

A number of comments were received requesting that the 30 percent of adjusted income paid by homebuyers be lowered. This is a statutory requirement and cannot be changed in this rule.

#### *Rent and Homebuyer Payment Collection Policy (Section 905.335)*

Commenters expressed dislike of the term "high risk", and suggested replacing it with "in need of technical assistance and/or additional funding to be provided by HUD." The term "high risk" is used for all grant programs, in accordance with 24 CFR part 85, and cannot be modified in this rule.

#### *Grievance Procedures and Leases (Section 905.340)*

Comments were received requesting that the local Office of Indian Programs make the decision on whether or not the jurisdiction's eviction procedures are sufficient to exclude from the IHA's lease and grievance procedures. The Department has determined that authority to make this legal determination should not be delegated at this time.

Comments were received requesting that the terms "serious or repeated" be deleted from the lease provision that allows the IHA to evict only upon serious or repeated violation of the lease. The Department will issue a proposed rule to revise these provisions to make them comport with recent statutory changes. At that time, all aspects of the lease and grievance issue can be discussed with the Indian community.

Comments were received asking for a revision in the language specifying that drug-related activity in "IHA-owned property" be changed to "IHA property" to avoid restricting applicability of this section to land leased to the IHA instead of being sold or transferred. The Department has revised the language to include both terms.

#### *Correction of Management Deficiencies (Section 905.350)*

Comments were received requesting that the statement HUD "shall provide maximum feasible assistance" be revised to read "shall provide technical assistance". The Department cannot guarantee that unlimited technical assistance will be available, so the recommended change has not been made.

#### *Tenant Participation and Management (Section 905.355)*

This section has been moved to a new subpart O, which contains all applicable regulations related to resident management and participation in the Indian housing program.

Comments were received objecting to new requirements for resident involvement and resident organizations. The language of the new rule specifically states that HUD's policy is to encourage resident participation, not require it. However, where residents are interested in developing resident organizations, IHAs should assist in this effort.

#### *E. Subpart E—Mutual Help Homeownership Opportunity Program*

##### *Scope and Applicability (Section 905.401)*

A recommendation was made that acquisition instructions should be included under this section. The Department feels that acquisition is adequately covered under subpart C and does not need to be repeated.

##### *Special Provisions for Development of an MH Project (Section 905.413)*

A request was made to not require IHAs to reimburse homebuyers for contributions of labor in the event of cancellation of a mutual help development project. The Department believes it would be inappropriate not to reimburse homebuyers when development of a project is canceled. (However, it is very seldom that a project is terminated after actual construction work has begun.)

##### *Selection of MH Homebuyers (Section 905.416)*

The "principal residence" requirement and subleasing discussion were criticized. Commenters said that IHAs and not the participant should decide if a sublease is acceptable. They also said that participants should be required to reside in their unit. Travel can be accommodated, but retaining and/or living in two or more houses should continue to be prohibited.

The rule has been revised to clarify the principal residence requirement. However, the Department believes that IHAs must individually address these issues in their admissions and occupancy policies. HUD does not want to usurp the authority of individual housing authority boards to develop local practices and procedures.

Language permitting a family to be selected even if it could not cover the administration charge with the prescribed percentage of its income if it could satisfy the IHA that it had the ability to satisfy all its financial obligations has been removed from the rule. It had been abused, allowing a family in that financial condition to enter the program who obviously could not satisfy the financial commitments of this program.

A commenter objected to the provision that a change in income before occupancy might affect a family's right to participate in the program. The regulations do state that once an agreement is signed and occupancy is achieved, a drop in income does not affect the contract, and only defaulting on a contract obligation and not an



inability to perform an obligation, is grounds for termination. However, if the applicant has not yet occupied the unit and has lost the ability to be a participant, the IHA may terminate the MHOA. The Department believes that it is unwise to burden an applicant with an obligation that the applicant cannot meet, and the section has been revised to clarify that the IHA may terminate the MHOA before occupancy.

#### *MH Contribution (Section 905.419)*

A comment was made that the Mutual Help Occupancy Agreement should not be required to be executed before construction for cluster site development. The regulation currently states that exceptions can be granted for this by HUD. The language has been revised to clarify that the OIP may make this exception.

#### *Maintenance, Utilities, and Use of Home (Section 905.428)*

A recommendation was made to allow IHAs to perform maintenance on MH units because of the remote location of many units and the lack of acceptable contractors. There is nothing which prevents this practice, as long as the homebuyer pays a market rate for work performed and materials used. Homebuyers must not be subsidized by the revenues of the rental program.

Commenters stated that there is an inconsistency in the current regulation. It requires the IHA to terminate the MHOA and evict the homebuyer before the IHA assumes maintenance responsibility for a home, yet other parts of the regulation imply that the homebuyer may remain while a plan of action is being implemented. The Department agrees with the comment and has eliminated the section requiring termination of the MHOA. However, if the homebuyer fails to agree to a plan, the IHA may terminate the MHOA and evict the homebuyer.

An additional account for homebuyer maintenance reserve was recommended as an option for the homebuyer. The maintenance reserve account could be used to replace equipment and address unforeseen non-routine maintenance of the home. Any interest earned from these accounts could be used for playgrounds, child care, and other homebuyer services administered by the resident council. The fund should be regarded as a security deposit to cover vacated delinquent rents and renovation costs.

The Department disagrees with this comment. Monies deposited by the homebuyer belong to that family and should not be used to fund other IHA activities. The changes made in this rule

to the Voluntary Equity Payments Account (VEPA) should allow for the homebuyer to save money in the VEPA for the changes discussed in the comment.

#### *Operating Subsidy (Section 905.434)*

One commenter asked to have resident management costs included as eligible costs under this section. The Department has not expanded the list of eligible activities. It believes there are sufficient sources of funding for resident management activities through the resident management technical assistance grant program and through CIAP.

#### *Homebuyer Reserves and Accounts (Section 905.437)*

A number of responses were received asking for greater flexibility on the use of the Monthly Equity Payments Account (MEPA) and VEPA. The Department has carefully considered all comments on this topic and has relaxed the use of the MEPA for certain uses and has greatly added to the flexibility of the VEPA.

A number of commenters wrote that there is an equity interest in the homebuyer's VEPA. Therefore, the funds in an individual homebuyer's VEPA account should be allowed to be pledged as security for a home equity loan for repairs to the unit. The Department agrees with this and has revised the language to allow the IHA to amend the MHOA to permit greater use of the VEPA by the homebuyer.

#### *Purchase of Home (Section 905.440)*

A number of commenters asked to have the purchase price reflect only those costs associated with the unit itself, as was the case before the definition of total development cost was revised. This change was made to reflect the comments.

Comments were received concerning the use of the term "option to purchase" as related to the homebuyer's right to conveyance of the home once the unit can be paid off from the balance of the equity accounts, the equity accounts with other funds of the homebuyer, or from IHA financing with these other funds. The design of the program is to convey title when these sources are sufficient to pay the remaining balance of the purchase price. In that case, there is no "option" to purchase. However, a homebuyer does have an "option" to purchase at any time when the homebuyer's resources, including any financing from the IHA or a private source, are sufficient to pay the remaining balance.

The Department has revised the language to require the IHA to convey title to the homebuyer when the homebuyer has the capacity from the equity accounts to pay the remainder of the purchase price. If a homebuyer should decline to purchase the home under such circumstances, the IHA would convert the unit and the homebuyer to the rental program.

IHAs urged HUD to expand the permissible uses of net proceeds of sale by IHAs. The regulation has been revised to permit net proceeds to be used for purposes related to low income housing use, as approved by HUD.

Questions were received about how to fund correction of deficiencies discovered in homes that have been conveyed to homebuyers. In such cases, if an entire remaining project is to be CIAP-funded for deficiency correction, commenters urged that any paid off units should also be eligible for the correction. Therefore, paid off units should remain eligible for CIAP funding to correct major problems. The Department disagrees. Once a unit is conveyed to a homebuyer, the new homeowner is responsible for that unit and is no longer eligible for financial assistance.

A comment was received asking for provision for forbearance in the Mutual Help program. As stated in the preamble of the interim rule, there is sufficient flexibility in the payback agreement to allow for the same function as a forbearance agreement.

A commenter suggested that an Indian Housing Authority should be able to determine both the purchase price and the term of the MHO Agreement for a subsequent homebuyer based on the remaining purchase price from the first homebuyer. The Department agrees with the comment and has revised the rule accordingly.

#### *Succession Upon Death or Mental Incapacity (Section 905.449)*

Commenters stated that the problem of succession pertains to both existing and future homebuyer agreements, and, as such, the regulations must provide that changes to the succession provision apply to existing as well as future agreements. The Department agrees with this comment and reminds IHAs that changes allowed in these regulations do not automatically apply to a particular homebuyer unless the MHOA is modified to reflect such change.

A recommendation was made to add Tribal law to the section on succession and occupancy on trust land. This change was made.



Commenters asked that the MH counseling regulations previously contained in this chapter be restored. The Department agrees and has added the language to § 905.453.

*F. Subpart F—Self-Help Development in the Mutual Help Homeownership Opportunity Program*

*Purpose and Applicability (Section 905.460)*

Numerous comments were received that this subpart should be deleted because of a belief that the Self-Help Program was created by statute and is available for use by IHAs until the authorization is rescinded.

*Self-Help Agreement (Section 905.466)*

Commenters disagreed with the provision that families be responsible to purchase insurance at their own expense. The Department has no authority to allow IHAs to buy insurance for private citizens from development funds. If homebuyers wish to participate in this program they will need to consider the insurance costs.

*G. Subpart G—Turnkey III Program Introduction (Section 905.501)*

Criticism was received that the Turnkey III program still reflects a public housing approach and is not sensitive to Indian housing needs. Commenters suggested that this entire section should be rewritten. In addition, a small number of changes were suggested on other parts of the subpart related to conversion from Turnkey III to mutual help and the process for subleasing units.

The Department believes that it would not be an efficient use of staff time and resources to embark on a major revision to a program that is no longer being funded and will eventually be out of existence as a result of conversion to the Mutual Help or rental programs. If there are instances where the current rule is not satisfactory for a particular case, the Department will consider waiver requests.

*Responsibilities of Homebuyer (Section 905.509)*

Commenters requested that the Turnkey III succession requirements be the same as those in the MH program. Revisions have been made to make them correspond—permitting a family member not residing in the unit at the time of the death or mental incapacity of the homebuyer to succeed the homebuyer.

In addition, a revision was made to allow persons not in compliance with

the requirements of the Turnkey III program to convert to MH with HUD approval (when they agree to repay arrearages within three years). This revision responds to a comment received before publication of the interim rule, which had not been implemented.

*H. Subpart H—Lead-Based Paint Poisoning Prevention*

When the interim rule was published, the Department was in the process of developing guidelines on lead-based paint poisoning prevention that were expected to influence the content of a pending rule on the subject. A subpart was reserved to address the subject because it was felt to require lengthy treatment, but since the content was felt to be in flux no rule provisions were included in the interim rule.

An interim rule on this subject was published on April 15, 1991 (56 FR 15170). Provisions concerning lead-based paint are found to some degree in the categories of development (subpart C), operations (subpart D), and modernization (subpart I). However, the provisions that correspond to subpart H of part 965 for public housing are located in this subpart. All of these provisions reflect the April 15 changes. (The Department's comprehensive rule on the subject is still found in part 35, and appropriate references to that part are found throughout this part.)

*I. Subpart I—Modernization*

A separate rulemaking has handled changes to the Indian housing program's modernization provisions. As published in the interim consolidated Indian housing rule, the only provisions on modernization were the comprehensive improvement assistance program (CIAP) ones.

Now the Department has added a new component—the comprehensive grant program—for larger IHAs (and PHAs), as well as adding a specific reference for one-time modernization in the Mutual Help program. These changes have taken place through a rulemaking that has addressed public comments received on changes needed to Indian housing modernization. (See 57 FR 5514, published on February 14, 1992.) The changes made in that rule are reflected in the modernization provisions included in their entirety in part I of this rule, with minor changes to correct errors in the February 14 publication.

*J. Subpart J—Operating Subsidy*

Pursuant to the Housing and Community Development Act of 1987, the performance funding system of determining operating subsidy has been

modified in two separate rulemakings since the publication of the interim rule. (See 56 FR 46356 and 57 FR 4282.) Consequently, provisions concerning sharing of energy cost reductions and appeal of the allowable expense level during Fiscal Year 1992 and miscellaneous changes are reflected in this rule.

*Computation of Allowable Expense Level (Section 905.710)*

Numerous comments were received concerning the adequacy of the performance funding system and its relation to Indian housing authorities and Indian country. At present, the Department chooses to maintain PFS consistently between public and Indian housing. We would like to point out that the appeals procedure, which was provided in a rule published in the Federal Register on February 4, 1992 (57 FR 4282), may alleviate some of the concerns expressed in response to this rule.

*Operating Reserves (Section 905.740)*

Some commenters urged HUD to reconsider its policy requiring operating budgets of IHAs to maintain a 40% operating reserve. In accordance with a formula, HUD currently calculates the operating subsidy by funding the difference between the allowable expense for an IHA and its projected income. The allowable expense is based, in part, on a base year expense level, which HUD does adjust to reflect inflation and changes in the housing stock but does not adjust to reflect actual increased costs experienced by the IHA. Commenters stated that as a result of the failure to adjust for actual costs, many IHAs receive an operating subsidy based on a significant understatement of their costs.

The National Affordable Housing Act requires a study of this issue by the Department. These comments will be forwarded as part of the study. When the study is complete, the findings will be made available to IHAs.

*Operating Budget Submission and Approval (Section 905.745)*

A commenter objected to the requirements for a detailed budget review. The Department has allowed for a more limited review where the IHA has demonstrated financial capacity. Otherwise, we strongly believe that a detailed budget review is necessary in order to protect the federal interest.

Commenters disagreed with the requirement for annual recertification of family incomes. This is a statutory requirement and may not be changed.



**K. Subpart K—Energy Audits, Conservation Measures and Utility Allowances**

This subpart has been expanded to include provisions corresponding to relevant sections of part 965, namely, subparts C through E.

**L. Subpart L—Operation of Projects After Expiration of Initial ACC Term Purpose and Applicability (Section 905.901)**

Comments asked for greater clarification on what happens to an IHA if it decides not to extend an ACC for additional operating subsidy. If any restrictions apply upon expiration of an ACC, those should be eliminated in the case of IHAs whose units will become Tribal assets managed directly by the Tribal governing body.

In any ACC executed or extended after August 1980, HUD required that an IHA agree not to convey, encumber, or dispose of the project property for 10 years after the last receipt of HUD operating subsidy, without HUD approval. If an IHA is subject to that provision in an ACC, it would continue to have effect after expiration of the ACC. Specific questions about the applicability of this subpart to an IHA or the meaning of an IHA's ACC provisions are best handled by consultation with the local Office of Indian Programs.

**M. Subpart M—Disposition or Demolition of Projects**

Minor changes were made to this subpart. One change was made to reflect the replacement of the housing assistance plan by the comprehensive housing affordability strategy (CHAS) as the planning document used by local governments with respect to the consultation process when a disposition or demolition decision is pending. Although Indian Tribes do not have to submit a CHAS, an IHA created pursuant to State law may operate within a jurisdiction where there is a HUD-approved CHAS. In that case, consultation with the local government would involve the applicable CHAS. Another change was made to reflect that applicable regulations concerning relocation responsibilities are now found at 49 CFR part 40. A third change was made to clarify how proceeds from a sale are applied in the case of a scattered site property.

The provisions of the 1937 Act dealing with disposition and demolition were changed both in 1988 and 1991, in ways not reflected in the 1990 interim rule. There are separate rulemakings underway to implement those changes, which will include changes to this

subpart. In the meantime, some guidance for implementing tenant consultation aspects of the statutory changes can be found in HUD Notice PIH 91-17.

**O. Subpart O—Resident Management**

This subpart was added as an expansion of what had been § 905.355. This subject needed the fuller treatment afforded by a separate subpart so that all the provisions concerning management contracts with resident management corporations could be included. This broader treatment in this rule will simplify the funding announcements for resident management and eliminate the need to waive current regulatory provisions to allow IHA resident management contracts to compete for funding with PHA resident management contracts.

**P. Subpart P—Section 5(h) Homeownership**

This subpart includes the content of a rule that was published on September 20, 1991 (56 FR 47852).

**IV. Findings and Certifications**

**A. Environmental Review**

A Finding of No Significant Impact with respect to the environment was made when the proposed rule was issued, in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The changes made in the interim rule and in this final rule do not change the program sufficiently to affect the validity of that Finding. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, room 10276, 451 Seventh Street, SW., Washington, DC 20410.

**B. Impact on the Economy**

This rule does not constitute a "major rule" as that term is defined in Section 1(b) of Executive Order 12291, Regulatory Planning Process. Analysis of the rule indicates that it does not: (1) Have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

**C. Federalism Impact**

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the Executive Order does not apply to this rule, since Indian Tribes do not fall within the order's coverage.

**D. Impact on the Family**

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. The rule governs a program of Federal financial assistance to low-income families through housing programs administered by Indian housing authorities. It consolidates requirements concerning Indian housing in a coordinated fashion, eliminating some prior approvals for the housing authorities. The changes are not likely to have any direct impact on families, as such.

**E. Regulatory Agenda**

This rule was listed as sequence number 1253 under the Office of Public and Indian Housing in the Department's Semiannual Regulatory Agenda published on April 27, 1992 (57 FR 16804, 16846), under Executive Order 12291 and the Regulatory Flexibility Act.

**F. Impact on Small Entities**

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule will not have a significant impact on a substantial number of small entities, i.e., small Indian Housing Authorities (IHAs), because this rule makes few substantive changes in the interim rule and those changes do not have major impact on small entities.

**G. Catalog**

The Catalog of Domestic Assistance numbers for the programs affected by this rule are 14.146, 14.147 and 15.141.

**List of Subjects**

**24 CFR Part 905**

Grant programs: Indians, Low and moderate income housing, Homeownership, Public housing.

**24 CFR Part 965**

Energy conservation, Government procurement, Grant programs—housing and community development, Lead poisoning, Loan programs—housing and



community development, Public housing, Reporting and recordkeeping requirements, Utilities.

Accordingly, part 905 of title 24 of the Code of Federal Regulations is revised and 965 of title 24 is amended, as follows:

## **PART 905—INDIAN HOUSING PROGRAMS**

### **Subpart A—General**

#### **Sec.**

- 905.101 Applicability and scope.
- 905.102 Definitions.
- 905.105 Types of low income housing projects.
- 905.110 Assistance from Indian Health Service and Bureau of Indian Affairs.
- 905.115 Applicability of civil rights requirements.
- 905.120 Compliance with other federal requirements.
- 905.125 Establishment of IHAs pursuant to state law.
- 905.126 Establishment of IHAs by tribal ordinance.
- 905.130 IHA Commissioners who are tenants or homebuyers.
- 905.135 Administrative capability.
- 905.140 Certification of housing managers.

### **Appendix I to Subpart A—Tribal Ordinance**

### **Subpart B—Procurement**

- 905.160 Procurement standards.
- 905.165 Indian preference.
- 905.170 Other requirements applicable to development contracts.
- 905.172 Wage rates.
- 905.175 Methods of procurement.
- 905.180 Training and employment requirements.
- 905.185 Government-wide contract requirements.

### **Subpart C—Development**

- 905.201 Roles and responsibilities of federal agencies.
- 905.205 Allocation.
- 905.210 Development priorities.
- 905.212 Authority to proceed without HUD approval.
- 905.215 Production methods and requirements.
- 905.220 Application procedures.
- 905.225 IHA development program.
- 905.230 Site selection criteria.
- 905.235 Types of interest in land.
- 905.240 Appraisals.
- 905.245 Site approval.
- 905.250 Design criteria.
- 905.255 Total development cost standard.
- 905.260 Construction and inspections.
- 905.265 Warranty inspections and enforcement.
- 905.270 Correcting deficiencies.
- 905.275 Fiscal closeout.

### **Subpart D—Operation**

- 905.301 Admission policies.
  - 905.305 Federal selection preferences.
  - 905.310 Restriction against ineligible aliens.
- [Reserved]

- 905.315 Initial determination, verification, and reexamination of family income and composition.
- 905.320 Determination of rents and homebuyer payments.
- 905.325 Total tenant payment—Rental and Turnkey III programs.
- 905.335 Rent and homebuyer payment collection policy.
- 905.340 Grievance procedures and leases.
- 905.345 Maintenance and improvements.
- 905.350 Correction of management deficiencies.
- 905.360 IHA employment practices.

### **Subpart E—Mutual Help Homeownership Opportunity Program**

- 905.401 Scope and applicability.
- 905.404 Program framework.
- 905.407 Application.
- 905.410 HUD review of application.
- 905.413 Special provisions for development of an MH project.
- 905.416 Selection of MH homebuyers.
- 905.419 MH contribution.
- 905.422 Commencement of occupancy.
- 905.425 Inspections, responsibility for items covered by warranty.
- 905.426 Homebuyer payments—Pre-1976 projects.
- 905.427 Homebuyer payments—Post-1976 projects.
- 905.428 Maintenance, utilities, and use of home.
- 905.431 Operating reserve.
- 905.434 Operating subsidy.
- 905.437 Homebuyer reserves and accounts.
- 905.440 Purchase of home.
- 905.443 IHA homeownership financing.
- 905.446 Termination of MHO agreement.
- 905.449 Succession upon death or mental incapacity.
- 905.452 Miscellaneous.
- 905.453 Counseling of homebuyers.
- 905.455 Conversion of rental projects.
- 905.458 Conversion of Mutual Help projects to rental program.

### **Subpart F—Self-Help Development in the Mutual Help Homeownership Opportunity Program**

- 905.460 Purpose and applicability.
- 905.463 Basic requirements.
- 905.466 Self-help agreement.
- 905.469 Application.
- 905.472 Development program.
- 905.475 HUD oversight.

### **Subpart G—Turnkey III Program**

- 905.501 Introduction.
- 905.503 Conversions of Turnkey III units and transfer of occupants.
- 905.505 Selection of Turnkey III homebuyers.
- 905.507 Homebuyer ownership opportunity agreements (HOOA).
- 905.509 Responsibilities of homebuyer.
- 905.511 Homebuyers' association and homeowners' association.
- 905.513 Breakeven amount and application of monthly payments.
- 905.515 Monthly operating expense.
- 905.517 Earned home payments account (EHPA).
- 905.519 Nonroutine maintenance reserve (NRMR).
- 905.521 Operating reserve.

- 905.523 Operating subsidy.
- 905.525 Achievement of ownership.
- 905.527 Payment upon resale at profit.
- 905.529 Termination of homebuyer ownership opportunity agreement.

### **Subpart H—Lead-Based Paint Poisoning Prevention**

- 905.551 Purpose and applicability.
- 905.553 Testing and abatement applicable to development.
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- 905.560 Notification.
- 905.565 Maintenance obligation; defective paint surfaces.
- 905.570 Procedures involving EBLs.
- 905.575 Compliance with tribal, state and local laws.
- 905.580 Monitoring and enforcement.

### **Subpart I—Modernization**

#### **General Provisions**

- 905.600 Purpose and applicability.
- 905.601 Allocation of funds under Section 14.
- 905.602 Special requirements for Turnkey III and Mutual Help developments.
- 905.603 Modernization and energy conservation standards.

#### **Comprehensive Improvement Assistance Program (For IHAs That Own or Operate Fewer Than 500 Indian Housing Units) (Fewer than 250 Units Beginning in FFY 1993)**

- 905.609 Purpose.
- 905.615 Eligible costs.
- 905.618 Procedures for obtaining approval of a modernization program.
- 905.621 Modernization project.
- 905.624 Resident participation.
- 905.627 Homebuyer participation.
- 905.633 Special requirements for section 23 leased housing bond-financed developments.
- 905.636 Additional limitations for special purpose modernization.
- 905.639 Contracting requirements.
- 905.642 Fund requisitions.
- 905.645 Progress reporting.
- 905.648 Budget revisions.
- 905.651 On-site inspections.
- 905.654 Fiscal closeout of a modernization program.

#### **Comprehensive Grant Program (For IHAs That Own or Operate 500 or More Indian Housing Units) (250 or More Units Beginning in FFY 1993)**

- 905.660 Purpose.
- 905.666 Eligible costs.
- 905.667 Reserve for emergencies and disasters.
- 905.669 Allocation of assistance.
- 905.672 Comprehensive plan (including action plan).
- 905.675 HUD review and approval of comprehensive plan (including action plan).
- 905.678 Annual statement of activities and expenditures.
- 905.681 Conduct of modernization activities.
- 905.684 IHA performance and evaluation report.
- 905.687 HUD review of IHA performance.



**Subpart J—Operating Subsidy**

- 905.701 Purpose and applicability.
- 905.705 Determination of amount of operating subsidy under PFS.
- 905.710 Computation of allowable expense level.
- 905.715 Computation of utilities expense level.
- 905.720 Other costs.
- 905.725 Projected operating income level.
- 905.730 Adjustments.
- 905.735 Transition funding for excessive high-cost IHAs.
- 905.740 Operating reserves.
- 905.745 Operating budget submission and approval.
- 905.750 Payment procedure for operating subsidy under PFS.
- 905.755 Payments of operating subsidy conditioned upon reexamination of income of families in occupancy.
- 905.760 Determining actual occupancy percentage.
- 905.770 Comprehensive occupancy plan requirements.

**Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances**

- 905.801 Purpose and applicability.
- Energy Audits and Energy Conservation Measures**
- 905.805 Requirements for energy audits.
  - 905.807 Energy conservation measures.
  - 905.810 Order of funding.
  - 905.812 Funding.
  - 905.815 Energy conservation equipment.
  - 905.820 Energy conservation practices.
  - 905.822 Compliance schedule.
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**Individual Metering of Utilities**

- 905.840 Individually metered utilities.
- 905.842 Benefit/cost analysis.
- 905.844 Funding.
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- 905.848 Compliance schedule.
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**Resident Utility Allowances**

- 905.860 Applicability.
- 905.865 Establishment of utility allowances by IHAs.
- 905.867 Categories for establishment of allowances.
- 905.869 Period for which allowances are established.
- 905.870 Standards for allowances for utilities.
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**Subpart L—Operation of Projects After Expiration of Initial ACC Term**

- 905.901 Purpose and applicability.
- 905.903 Continuing eligibility for operating subsidy; ACC extension.
- 905.905 ACC extension in absence of current operating subsidy.
- 905.907 HUD approval of disposition or demolition.

**Subpart M—Disposition or Demolition of Projects**

- 905.921 Purpose and applicability.
- 905.923 General requirements for HUD approval of disposition or demolition.
- 905.925 Relocation of displaced tenants.
- 905.927 Specific criteria for HUD approval of disposition requests.
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- 905.931 IHA application for HUD approval.
- 905.933 Use of proceeds.
- 905.935 Replacement housing plan.
- 905.937 Reports and records.

**Subpart N—Miscellaneous**

- 905.950 Operating subsidy eligibility for projects owned by IHAs in Alaska.

**Subpart O—Resident Management and Participation**

- 905.960 Purpose.
- 905.961 Applicability and scope.
- 905.962 Definitions.
- 905.963 HUD's role in activities under this subpart.
- 905.964 Resident participation requirements.
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- 905.966 Continued IHA responsibility to HUD.
- 905.967 Management specialist.
- 905.969 Modernization assistance.
- 905.970 Operating subsidy, preparation of operating budget, operating reserves and retention of excess revenues.
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- 905.1001 Purpose.
- 905.1002 Applicability.
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- 905.1004 Fundamental criteria for HUD approval.
- 905.1005 Resident consultation and involvement.
- 905.1006 Property that may be sold.
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- 905.1008 Purchaser eligibility and selection.
- 905.1009 Counseling, training, and technical assistance.
- 905.1010 Nonpurchasing residents.
- 905.1011 Maintenance reserve.
- 905.1012 Purchase prices and financing.
- 905.1013 Protection against fraud and abuse.
- 905.1014 Limitation of resale profit.
- 905.1015 Use of sale proceeds.
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- 905.1017 Records, reports, and audits.
- 905.1018 Submission and review of homeownership plan.
- 905.1019 HUD approval and IHA-HUD implementing agreement.
- 905.1020 Content of homeownership plan.
- 905.1021 Supporting documentation.

**Authority:** 42 U.S.C. 1437aa-1437ee; 25 U.S.C. 450e(b); 42 U.S.C. 3535(d).

Subpart P also issued under secs. 5(h) and 6(c)(4)(D), United States Housing Act of 1937.

**Subpart A—General****§ 905.101 Applicability and scope.**

(a) *General.* (1) Under title II of the United States Housing Act of 1937, as added by the Indian Housing Act of 1988 (42 U.S.C. 1437aa, *et seq.*), the U.S. Department of Housing and Urban Development (HUD) provides financial and technical assistance to Indian Housing Authorities (IHAs), for the development and operation of low income housing projects in Indian areas. This part is applicable to such projects developed or operated by an IHA in an Indian area, as defined in § 905.102.

(2) If assistance under this part is not available to a low income family because the family desires housing in an area within which no IHA is authorized to provide housing, or if for any other reason a family desires housing assistance other than under this part, a family may seek housing assistance under other HUD programs: (See 24 CFR part 203, and chapter VIII, as well as the remainder of chapter IX of this title.)

(b) *Other HUD regulations and requirements.* The provisions of this part are a complete statement of HUD regulations affecting the development and operation of low income housing by IHAs except as supplemented by parts in other chapters of this title, which are referenced in this part.

**§ 905.102 Definitions.**

*ACC expiration date.* The last day of the term during which a particular Indian housing project is subject to all or any of the provisions of the ACC.

*Act.* The United States Housing Act of 1937 (42 U.S.C. 1437-1440).

*Action plan.* A plan of the actions to be funded by an IHA over a period of five years (including an IHA's proposed allocation of its modernization funds to a reserve established under § 905.666(a) (3)) to make the necessary physical and management improvements identified in the IHA's comprehensive plan under subpart I. The plan shall be based upon HUD's and the IHA's best estimates of the funding reasonably expected to become available over the next five-year period. The action plan is updated annually to reflect a rolling five-year base.

*Adjusted income.* Annual income less the following allowances; determined in accordance with HUD instructions:

- (1) \$480 for each dependent;
- (2) \$400 for any elderly family;
- (3) For any family that is not an elderly family but has a handicapped or disabled member other than the head of household or spouse, handicapped assistance expenses in excess of three



percent of annual income, but this allowance may not exceed the employment income received by family members who are 18 years of age or older as a result of the assistance to the handicapped or disabled person;

(4) For any elderly family—

(i) That has no handicapped assistance expenses (as defined in this section), an allowance for medical expenses (as defined in this section) equal to the amount by which the medical expenses exceed three percent of annual income;

(ii) That has handicapped assistance expenses greater than or equal to three percent of annual income, an allowance for handicapped assistance expenses computed in accordance with paragraph (c) of this section, plus an allowance for medical expenses that is equal to the family's medical expenses;

(iii) That has handicapped assistance expenses that are less than three percent of annual income, an allowance for combined handicapped assistance expenses and medical expenses that is equal to the amount by which the sum of these expenses exceeds three percent of annual income; and

(5) The greater of:

(i) Child care expenses, as defined in this section; or

(ii) Excessive travel expenses, not to exceed \$25 per family per week, for employment or education related travel.

**Administration charge.** In Mutual Help projects, the amount budgeted per-unit per-month for operating expense, exclusive of the cost of HUD-approved expenditures for which operating subsidy is being provided in accordance § 905.434 (See § 905.427(c).)

**Administrative capability assessment (ACA).** An annual evaluation of the IHA's administrative capability to administer programs in compliance with the Act and all applicable HUD regulations, contracts, HUD handbooks, and other applicable requirements. (See § 905.135).

**Allowable expense level.** In rental projects, the per-unit per-month dollar amount of expenses (excluding utilities, and expenses allowed under § 905.720) computed in accordance with § 905.710, which is used to compute the amount of operating subsidy.

**Allowable utilities consumption level (AUCL).** In rental projects, the amount of utilities expected to be consumed per-unit per-month by the IHA during the requested budget year, which is equal to the average amount consumed per-unit per-month during the rolling base period. After the end of the requested budget year, the AUCL of the utility (ies) used for space heating will be adjusted by a

change factor, which is defined in this section.

**Annual contributions contract (ACC).** A contract under the Act between HUD and the IHA containing the terms and conditions under which the Department assists the IHA in providing decent, safe, and sanitary housing for low income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization and/or operation of a low income housing project under the Act, and the IHA agrees to develop, modernize and operate the project in compliance with all provisions of the ACC and the Act, and all HUD regulations and implementing requirements and procedures.

**Annual income.** Annual income is the anticipated total income from all sources received by the family head and spouse (even if temporarily absent) and by each additional member of the family, including all net income derived from assets, for the 12-month period following the effective date of the initial determination or reexamination of income, exclusive of certain types of income as provided in paragraph (2) of this definition.

(1) Annual income includes, but is not limited to:

(i) The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;

(ii) The net income from operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations. Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family;

(iii) Interest, dividends, and other net income of any kind from real or personal property. Expenditures for amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation is permitted only as authorized in paragraph (2) (ii) of this definition. Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family. Where the family has net family assets in excess of \$5,000,

annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate as determined by HUD;

(iv) The full amount of periodic payments received from social security, annuities, insurance policies, retirement funds, pensions, disability or death benefits and other similar types of periodic receipts, including a lump-sum payment for the delayed start of a periodic payment;

(v) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay (but see paragraph (2) (iii) of this definition);

(vi) Welfare assistance. If the welfare assistance payment includes an amount specifically designated for shelter and utilities that is subject to adjustment by the welfare assistance agency in accordance with the actual cost of shelter and utilities, the amount of welfare assistance income to be included as income shall consist of: (A) the amount of the allowance or grant exclusive of the amount specifically designated for shelter or utilities, plus (B) the maximum amount that the welfare assistance agency could, in fact, allow the family for shelter and utilities. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under this paragraph (1) (vi) (B) shall be the amount resulting from one application of the percentage;

(vii) Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the dwelling; and

(viii) All regular pay, special pay and allowances of a member of the Armed Forces (but see paragraph (c) (7) of this section).

(2) Annual income does not include the following:

(i) Income from employment of children (including foster children) under the age of 18 years;

(ii) Payments received for the care of foster children;

(iii) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (but see paragraph (1) (v) of this definition);

(iv) Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member;



(v) Income of a live-in aide;  
 (vi) Amounts of educational scholarships paid directly to the student or to the educational institution, and amounts paid by the Government to a veteran, for use in meeting the costs of tuition, fees, books, equipment, materials, supplies, transportation and miscellaneous personal expenses of the student. Any amount of such scholarship or payment to a veteran that is made available for subsistence is to be included in income;

(vii) The special pay to a family member serving in the Armed Forces who is exposed to hostile fire;

(viii) (A) Amounts received under training programs funded by HUD;

(B) Amounts received by a disabled person that are disregarded for a limited time for purposes of Supplemental Security Income eligibility and benefits because they are set aside for use under a Plan to Attain Self-Sufficiency (PASS); or

(C) Amounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred (special equipment, clothing, transportation, child care, etc.) and which are made solely to allow participation in a specific program;

(ix) Temporary, nonrecurring or sporadic income (including gifts); or

(x) Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of assistance programs that includes assistance under the United States Housing Act of 1937. A notice is published from time to time in the Federal Register and distributed to IHAs identifying the benefits that qualify for this exclusion. Updates will be published and distributed when necessary.

(3) If it is not feasible to anticipate a level of income over a 12-month period, the income anticipated for a shorter period may be annualized subject to a redetermination at the end of the shorter period.

**Annual statement.** A statement submitted annually by an IHA to HUD of the activities and related costs it expects to fund with the annual grant under subpart I of this part. An IHA may also elect to submit an annual statement covering work proposed for up to a two-year period, so that it can increase its flexibility in carrying out work items in the coming year.

**Applicable surface.** All intact and nonintact interior and exterior painted surfaces of a residential structure.

**Approved certifying organization.** Any organization(s) or entity(ies) approved

by HUD, under § 905.140, which will administer a program for certification of IHA housing managers under this part.

**Assisted dwelling unit.** A dwelling unit assisted under the programs covered by this part 905.

**Base year.** The IHA's fiscal year immediately preceding its first fiscal year under PFS.

**Base-year expense level.** The expense level (excluding utilities, audits, and certain other items) for the year, computed as provided in § 905.710(a).

**Benefit/cost analysis.** For purposes of subpart K, a direct comparison of the present worth of any savings generated by a given system during the expected useful life of the system or the estimated remaining life of the project, whichever is the shortest number of years, to the cost of the change.

**BIA.** The Bureau of Indian Affairs in the Department of the Interior.

**Change factor.** The ratio of the affected IHA fiscal year heating degree days (HDD) divided by the average annual HDD of the rolling base period. (Affected year HDD divided by rolling base period average HDD).

**Checkmeter.** A device for measuring utility consumption of each individual dwelling unit where the utility service is supplied through a mastermeter system. The IHA pays the utility supplier on the basis of the mastermeter readings and uses the checkmeters to determine whether and to what extent utility consumption of each dwelling unit is in excess of the allowance for IHA-furnished utilities, established in accordance with subpart K.

**Chewable surface.** All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork.

**Chief executive officer (CEO).** The CEO of a unit of general local government means the elected official or the legally designated official, who has the primary responsibility for the conduct of that entity's governmental affairs. Examples of the CEO of a unit of general local government are: The elected mayor of a municipality; the elected county executive of a county; the chairperson of a county commission or board in a county that has no elected county executive; or the official designated pursuant to law by the governing body of a unit of general local government (e.g., Tribal administrator). The CEO for an Indian Tribe is the Tribal governing official.

**Child care expenses.** Amounts anticipated to be paid by the family for

the care of children under 13 years of age during the period for which annual income is computed, but only where such care is necessary to enable a family member to be gainfully employed or to further his or her education only to the extent such amounts are not reimbursed. The amount deducted shall reflect reasonable charges for child care, and, in the case of child care necessary to permit employment, the amount deducted shall not exceed the amount of income received from such employment.

**Common property.** The non-dwelling structures and equipment, common areas, community facilities, and in some cases certain component parts of dwelling structures, which are contained in the development. It also may include common property as defined in a cooperative form of ownership, as determined by the IHA.

**Comprehensive grant number.** A grant number that is unique to each annual statement (under subpart I) covering the improvements to one or more existing Indian housing projects.

**Comprehensive modernization.** A modernization program for a project which provides for all needed physical and management improvements. Under the Comprehensive Improvement Assistance Program (CIAP), all modernization programs are comprehensive modernization, except those defined as emergency, homeownership, lead-based paint or special purpose.

**Comprehensive plan.** A plan prepared by an IHA, and approved by HUD, under the Comprehensive Grant Program setting forth all of the physical and management improvement needs of the IHA and its Indian housing developments, indicating the relative urgency of needs, and which includes the IHA's action plan, cost estimates, and required local government and IHA certifications. The comprehensive plan may be revised, as necessary, but must be revised at least every sixth year. See subpart I of this part.

**Construction contract.** The contract for construction in the case of the conventional method, or the contract of sale in the case of the Turnkey method.

**Cooperation agreement.** An agreement between an IHA and a local governing (taxing) body that assures exemption from real and personal property taxes and provides for payments in lieu of taxes by the IHA; and that provides for cooperation with respect to the development and operation of low income housing owned by the IHA.

**Cost effective.** As used in subpart K, an energy conservation measure with a



pay-back period of fifteen years or shorter shall be considered cost effective.

**Current budget year.** The IHA fiscal year in which the IHA is operating.

**Defective lead-based paint surface.** Paint on applicable surfaces having a lead content of greater than or equal to 1 mg/cm<sup>2</sup>, that is cracking, scaling, chipping, peeling or loose.

**Defective paint surface.** Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

**Demolition.** The razing in whole, or in part, of one or more permanent buildings of an Indian housing project.

**Dependent.** A member of the family household (excluding foster children) other than the family head or spouse, who is under 18 years of age or is a disabled person or handicapped person, or is a full-time student.

**Deprogramming.** Removal from the IHA's inventory under the ACC, pursuant to the IHA's formal request and HUD's approval, of a dwelling unit no longer used for dwelling purposes or a nondwelling structure or a unit used for nondwelling purposes that the IHA has determined will no longer be used for IHA purposes.

**Development.** Any or all undertakings necessary for planning; land acquisition, demolition, construction, or equipment, in connection with a low income housing project.

**Disabled person.** A person who is under a disability as defined in section 223 of the Social Security Act (42 U.S.C. 423), or who has a developmental disability as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(7)).

**Displaced person.** A person displaced by governmental action, or a person whose dwelling has been extensively damaged or destroyed as a result of a disaster declared or otherwise formally recognized under Federal disaster relief laws.

**Disposition.** The conveyance or other transfer by the IHA, by sale or other transaction, of any interest in the real estate of an Indian housing project, but does not cover transfers of property described in § 905.921(b) (1) (i)-(vii).

**Earned home payments account (EHPA).** In the Turnkey III program (subpart G), this account is established and maintained as described in § 905.517.

**Elderly family.** A family whose head or spouse (or sole member) is an elderly, disabled, or handicapped person, as defined in this section. It may include two or more elderly, disabled or handicapped persons living together, or one or more of these persons living with

one or more live-in aides, as defined in this section.

**Elderly person.** A person who is at least 62 years of age.

**Elevated blood lead level or EBL.** Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

**Emergency work.** Physical work items of an emergency nature, posing an immediate threat to the health or safety of residents, which must be completed within one year of funding. Under the Comprehensive Grant program, management improvements are not eligible as emergency work and, therefore, must be covered by the comprehensive plan (including the action plan), before the IHA may carry them out. See subpart I of this part.

**Energy audit.** A process carried out in accordance with subpart K, which identifies and specifies the energy and cost savings that are estimated to result from installing or accomplishing an energy conservation measure.

**Energy conservation measures (ECMs).** Physical improvements or modifications that, if undertaken for a building or facility, or its equipment, are likely to reduce the cost of energy in an amount sufficient to recover the installation costs in a period no longer than the useful life of the measure. See subpart K.

**Family.** Family includes but is not limited to (a) an elderly family or single person as defined in this part, (b) the remaining member of a tenant family, and (c) a displaced person.

**Family project.** Any project assisted under section 9 of the Act that is not an elderly project. For this purpose, an elderly project is one that was designated for occupancy by the elderly at its inception (and has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project to elderly families. A building within a mixed-use project that meets these qualifications shall, for purposes of this definition, be excluded from any family project, as shall zero bedroom units.

**FFY.** Federal Fiscal Year (starting with October 1, and ending with September 30, and designated by the calendar year in which it ends).

**Financial feasibility.** With respect to modernization, the cost (excluding the cost of management improvements, administration, architectural and engineering fees, and other fees) of the modernization program does not exceed 90 percent of the total development cost

standard for a new project with the same structure type and number and size of units and in the market area.

**Force account labor.** Labor directly employed by the IHA on either a permanent or a temporary basis.

**Formula.** The formula prescribed by HUD to be used in the Performance Funding System to estimate the cost of operating an average unit in an IHA's inventory. (See subpart J.)

**Formula expense level.** The per-unit per-month dollar amount of expenses (excluding utilities and audits) computed under the formula, in accordance with § 905.710.

**Full-time student.** A person who is carrying a subject load that is considered full-time for day students under the standards and practices of the educational institution attended. An educational institution includes a vocational school with a diploma or certificate program, as well as an institution offering a college degree.

**Handicapped assistance expenses.** Reasonable expenses that are anticipated, during the period for which annual income is computed, for attendant care and auxiliary apparatus for a handicapped or disabled family member and that are necessary to enable a family member (including the handicapped or disabled member) to be employed, provided that the expenses are neither paid to a member of the family nor reimbursed by an outside source.

**Handicapped person.** A person having a physical or mental impairment that (a) is expected to be of long-continued and indefinite duration, (b) substantially impedes his or her ability to live independently, and (c) is of such a nature that such ability could be improved by more suitable housing conditions.

**Hard costs.** The physical improvement costs in development accounts 1450 through 1475 of the Low-Rent Housing Accounting Handbook, 7510.1, as revised, which include: Account 1450 Site Improvements; Account 1460 Dwelling Structures; Account 1465.1 Dwelling Equipment—Nonexpendable; Account 1470 Nondwelling Structures; and Account 1475 Nondwelling Equipment.

**Heating degree days (HDD).** The annual arithmetic sum of the positive differences (those under 65 degrees) of the average of the lowest and highest daily outside temperature in degrees Fahrenheit, subtracted from 65 degrees Fahrenheit.

**High-risk.** See 24 CFR 85.12 and 905.135.



**Home.** A dwelling unit covered by a homebuyer agreement.

**Homebuyer.** The member or members of a low income family who have executed a homebuyer agreement with the IHA and who have not yet achieved homeownership.

**Homebuyer agreement.** A Mutual Help and Occupancy Agreement or a Turnkey III Homebuyer's Ownership Opportunity Agreement.

**Homeowner.** A former homebuyer who has achieved ownership of his or her home and acquired title to the home.

**Homeownership modernization.** A modernization program for a development that is under the Turnkey III Homeownership Opportunities Program or the Mutual Help Homeownership Opportunity Program. Under homeownership modernization, limited physical improvements and special purpose management improvements are eligible modernization costs.

**Housing manager.** Any person who, irrespective of title, is responsible for the management and operation of low income housing subject to this part. This person may be the Executive Director, Assistant Executive Director, or any staff member of an IHA who is responsible for overall management.

**HUD.** The Department of Housing and Urban Development, including the field offices that have been delegated authority under the Act to perform functions pertaining to this part for the area in which the IHA is located.

**HUD field office.** The HUD Offices in Chicago, Oklahoma City, Denver, Phoenix, Seattle, and Anchorage, which have been delegated authority to administer programs under the United States Housing Act of 1937 for the area in which the IHA is located. Each Regional Administrator is responsible for administrative and programmatic oversight of the Indian housing program in the region.

**IHA homeownership financing.** IHA financing for purchase of a home by an eligible homebuyer who gives the IHA a promissory note and mortgage for the balance of the purchase price.

**IHA project proposal.** A statement of the basic elements of a project, including the estimated total development cost of the project, as adopted by the IHA and approved by HUD.

**IHS.** The Indian Health Service in the Department of Health and Human Services.

**Indian.** Any person recognized as being an Indian or Alaska Native by an Indian Tribe, the Federal Government, or any State.

**Indian area.** The area within which an Indian Housing Authority is authorized to provide low income housing.

**Indian Housing Authority (IHA).** An entity that is authorized to engage in or assist in the development or operation of low income housing for Indians that is established either (1) by exercise of the power of self-government of an Indian Tribe independent of State law; or (2) by operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

**Indian Tribe.** Any Tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives.

**Interdepartmental agreement.** The agreement among HUD, the Department of Health and Human Services, the Department of Interior, and other appropriate agencies, concerning assistance to projects developed and operated under the Act.

**Latent defect.** A design or construction deficiency that could not reasonably have been foreseen by the IHA or the Office of Indian Programs.

**Lead-based paint.** A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1.0 mg/cm<sup>2</sup>, or .5% by weight.

**Lead-based paint modernization.** A modernization program for a family project that is limited to lead-based paint testing and/or lead-based paint hazard abatement as prescribed in subpart H. For such projects, management improvements are not eligible modernization costs.

**Live-in aide.** A person who resides with an elderly, disabled, or handicapped person or persons and who (a) is determined by the IHA to be essential to the care and well-being of the person(s); (b) is not obligated for support of the person(s); and (c) would not be living in the unit except to provide necessary supportive services. (See definition of annual income for treatment of a live-in aide's income.)

**Local inflation factor.** The weighted average percentage increase in local government wages and salaries for the area in which the IHA is located and non-wage expenses based upon the implicit price deflator for State and local government purchases of goods and services. This weighted average percentage will be supplied by HUD. HUD anticipates that it will update the local inflation factor each year.

**Low-income family.** A family whose annual income does not exceed 80 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families. HUD may establish income limits higher or lower than 80 percent of

the median income for an Indian area on the basis of its finding that such variations are necessary because of the prevailing levels of construction costs or unusually high or lower family incomes.

**Major changes.** In the context of the modernization program administered under subpart I of this part, major changes means additions, deletions or modifications of work items cumulatively totaling 10 percent or more of an IHA's annual grant allocation, excluding emergencies. Major changes require prior HUD approval. Any changes with respect to work items cumulatively totaling less than 10 percent of an IHA's annual grant allocation, excluding emergencies, do not require prior HUD approval, so long as the work is covered under the IHA's action plan. (See § 905.678(h).)

**Management improvement plan.** A document developed by the IHA in accordance with § 905.135 which specifies the actions to be taken, including timetables, to correct deficiencies identified as a result of a management assessment.

**Mastermeter system.** A utility distribution system in which an IHA is supplied utility service by a utility supplier through a meter or meters and the IHA then distributes the utility to its tenants.

**Medical expenses.** Those medical expenses, including medical insurance premiums, that are anticipated during the period for which annual income is computed, and that are not covered by insurance.

**Meter loop.** A device provided to accommodate future installation of a utility meter. See subpart K.

**Modernization funds.** Funds derived from an allocation of budget authority for the purpose of funding physical and management improvements.

**Modernization program.** An IHA's program for carrying out modernization, as set forth in the approved application for modernization funds. See subpart I.

**Modernization project.** The improvement of one or more existing Indian housing developments, under a new project number designated for modernization under the Comprehensive Improvement Assistance Program (CIAP).

**Monthly adjusted income.** One twelfth of adjusted income.

**Monthly Equity Payments Account (MEPA).** A homebuyer account in the Mutual Help Homeownership Opportunity program credited with the amount by which each required monthly payment exceeds the administration charge.



**Monthly income.** One twelfth of annual income.

**MH Mutual Help.**

**MH Construction Contract.** A construction contract for an MH project, which shall be on a form prescribed by HUD.

**MH Contribution.** Land, labor, cash, materials, or equipment—or a combination of these—contributed toward the development cost of a project in accordance with a homebuyer's MHO Agreement, credit for which is to be used toward purchase of a home.

**MH Program.** The MH Homeownership Opportunity Program.

**MHO Agreement.** A Mutual Help and Occupancy Agreement between an IHA and a homebuyer.

**Near elderly family.** A family whose head or spouse (or sole member) is at least 50 years of age but below the age of 62 years.

**Net family assets.** Net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment, excluding interests in Indian trust land and excluding equity accounts in HUD homeownership programs. The value of necessary items of personal property such as furniture and automobiles are excluded, and, in the case of a family in which any member is actively engaged in a business or farming operation, the assets that are a part of the business or farming operation are excluded. In cases where a trust fund, such as individual Indian monies held by the BIA, has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. In determining net family assets, IHAs shall include the value of any business or family assets disposed of by an applicant or tenant for less than fair market value (including a disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application for the program or reexamination, as applicable, in excess of the consideration received therefor. In the case of a disposition as part of a separation or divorce settlement, the disposition will not be considered to be for less than fair market value if the applicant or tenant receives important consideration not measurable in dollar terms.

**Nonroutine maintenance.** (1) For purposes of the Turnkey III Program (Nonroutine Maintenance Reserve), nonroutine maintenance refers to

infrequent and costly items of maintenance and replacement, including dwelling equipment such as a range or refrigerator, or major components such as heating or plumbing systems or a roof. Specifically excluded are maintenance expenses attributable to homebuyer negligence or to defective materials or workmanship.

(2) For purposes of the CIAP and Comprehensive Grant Modernization Programs under subpart I of this part and the applicability of wage rates, nonroutine maintenance refers to work items that ordinarily would be performed on a regular basis in the course of upkeep of a property, but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify.

**NRMR.** The nonroutine maintenance reserve account in the Turnkey III Program established and maintained in accordance with § 905.519.

**Operating budget.** The IHA's operating budget (HUD form 52564) and all related documents, required by HUD to be submitted pursuant to the ACC.

**Operating subsidy.** Annual contributions for IHA operations made by HUD under the authority of section 9 of the Act. See subpart J of this part with respect to rental projects. See also § 905.434 (Mutual Help Operating Subsidy) and § 905.523 (Turnkey III Operating Subsidy).

**Other income.** Income to the IHA other than dwelling rental income and income from investments, except that, for purposes of determining operating subsidy eligibility, the following items are excluded: Grants and gifts for operations, other than for utility expenses, received from Federal, State, and local governments, individuals or private organizations; amounts charged to tenants for repairs for which the IHA incurs an offsetting expense; and legal fees in connection with eviction proceedings, when those fees are lawfully charged to tenants.

**Partnership process.** A specific and ongoing process that is designed to ensure that residents, resident groups, and the IHA work in a cooperative and collaborative manner to develop, implement and monitor the Comprehensive Grant program. At a

minimum, the IHA shall ensure that this Partnership Process incorporates full resident participation in each of the required program components.

**Pay-back period.** The number of years required to accumulate net savings to equal the cost of an energy conservation measure.

**Performance funding system (PFS).** The standards, policies and procedures established by HUD for determining the amount of operating subsidy an IHA is eligible to receive for its owned rental projects, based on the costs of operating a comparable well-managed project.

**PILOT.** Payment in lieu of taxes. Includes all payments made by an IHA to the local governing body (or other taxing jurisdiction) for the provision of certain municipal services, including that portion of payments in lieu of taxes which is to be applied as a reimbursement of payments of offsite utilities. The amount charged is determined by the cooperation agreement which is generally defined as 10 percent of shelter rent. Shelter rent is defined as dwelling rentals less total utility expenses.

**Program reservation.** A written notification by HUD to an IHA, which is not a legal obligation, but which expresses HUD's determination, subject to fulfillment by an IHA of all legal and administrative requirements within a stated time, that HUD will enter into a new or amended ACC covering the stated number of housing units, or such other number as is consistent with funding reserved by HUD for the project.

**Project.** Housing developed, acquired, or assisted by an IHA under the Act, and the improvement of this housing.

**Project for elderly families.** A rental project or portion of a rental project assisted under the U. S. Housing Act of 1937 that was designated for occupancy by the elderly at its inception (and that has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project, or for a portion of the units in the project, to Elderly Families.

**Project units.** All dwelling units of an IHA's projects.

**Projected operating income level.** The per unit per month dollar amount of dwelling rental income plus nondwelling income, computed as provided in § 905.725.

**Requested budget year.** The budget year (fiscal year) of an IHA following the current budget year.

**Resident groups.** Democratically elected resident groups such as IHA-wide resident groups, area-wide



resident groups, single development resident groups, or RMCs.

**Retail service.** Purchase of utility service by IHA tenants directly from the utility supplier.

**Rolling base period.** The 36-month period that ends 12 months before the beginning of the IHA requested budget year, which is used to determine the allowable utilities consumption level used to compute the utilities expense level.

**Single person.** A person who lives alone or intends to live alone, and who does not qualify as (1) an elderly family, (2) a displaced person (as defined in this section), or (3) the remaining member of a tenant family.

**Soft costs.** The non-physical improvement costs, which exclude any costs in development accounts 1450 through 1475.

**Special purpose management modernization.** Mutual Help, Turnkey III, and rental developments are eligible for this category of special purpose modernization.

**Special purpose modernization.** A modernization program for a project that is limited to any one or more of the following types of physical and management improvements otherwise eligible for CIAP funding under this part, subject to a HUD determination that the physical or management improvements are necessary and sufficient to extend substantially the useful life of the development, beyond that which it would have if such improvements were not made (examples cited in each category are for illustration only):

(1) Physical improvements to replace or repair major equipment systems (such as elevators and heating, cooling, electrical, and water and sewer systems) or structural elements (such as roofs, walls and foundations);

(2) Physical improvements to upgrade security, such as installation of additional lighting, security screens on windows, better locks, or design changes to enhance security (excluding non-physical improvements, such as security staffing and services);

(3) Physical improvements to increase accessibility for elderly and handicapped families, according to the applicable standards of 24 CFR part 8;

(4) Physical improvements to reduce the number of units that are vacant and substandard, including any improvements necessary to meet local code requirements and return the units to occupancy; and

(5) Cost-effective physical improvements to increase the energy efficiency of the project.

**State.** Any of the several States of the United States of America, the District of

Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, the Trust Territory of the Pacific Islands, and Indian Tribes.

**Subsequent homebuyer.** Any homebuyer other than the homebuyer who first occupies a home pursuant to an MHO agreement.

**Substantial rehabilitation.** A modernization program for a project that provides for all physical and management improvements needed to meet the modernization and energy conservation standards and to ensure long-term physical and social viability.

**Successor homebuyer.** A person eligible to become a homebuyer who has been designated by a current homebuyer to succeed to an interest under a homeownership agreement in the event of the current homebuyer's death or mental incapacity.

**Surcharge.** The amount charged by the IHA to a tenant, in addition to the Tenant Rent, for consumption of utilities in excess of the allowance for IHA-furnished utilities or for estimated consumption attributable to tenant-owned major appliances or to optional functions of IHA-furnished equipment. Surcharges calculated pursuant to subpart K, based on estimated consumption where checkmeters have not been installed, are referred to as "scheduled surcharges."

**Tenant-purchased utilities.** Utilities purchased by the tenant directly from a utility supplier.

**Tenant rent.** The amount payable monthly by the family as rent to the IHA. Where all utilities (except telephone) and other essential housing services are supplied by the IHA, tenant rent equals total tenant payment. Where some or all utilities (except telephone) and other essential housing services are not supplied by the IHA and the cost thereof is not included in the amount paid as rent, tenant rent equals total tenant payment less the utility allowance.

**Total development cost.** The sum of all HUD-approved costs for a project including all undertakings necessary for planning, site acquisition, demolition, construction or equipment and financing (including the payment of carrying charges), and for otherwise carrying out the development of the project. Offsite water and sewer facilities development costs are not included.

**Total tenant payment.** The monthly amount calculated under subpart D of this chapter. Total tenant payment does not include any surcharge for excess utility consumption or other miscellaneous charges (see subpart K).

**Tribe.** Any tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives.

**Unit months available.** Project units multiplied by the number of months the project units are expected to be available for occupancy during a given IHA fiscal year. Except as provided in the following sentence, for purposes of this part, a unit is considered available for occupancy from the date on which the end of the initial operating period for the project is established until the time it is approved by HUD for deprogramming and is vacated or approved for nondwelling use. On or after July 1, 1991, a unit is not considered available for occupancy in any IHA Requested Budget Year if the unit is located in a vacant building in a project that HUD has determined is nonviable.

**Utilities.** For purposes of determining utility allowances, utilities include electricity, gas, heating fuel, water, sewerage service, septic tank pumping/maintenance, sewer system hookup charges (after development), and trash and garbage collection. Telephone service is not included as a utility. For purposes of IHA accounting and PFS, trash and garbage collection and maintenance and repair of any systems are considered maintenance expenses and not utility expenses.

**Utilities expense level.** The per-unit per-month dollar amount of utilities expense used in calculation of operating subsidy, as provided in § 905.715.

**Utility allowance.** An allowance for IHA-furnished utilities represents the maximum consumption units (e.g., kilowatt hours of electricity), that may be used by a dwelling unit without a surcharge against the tenant for excess consumption. An allowance for tenant-purchased utilities is a fixed dollar amount that is deducted from the total tenant payment otherwise chargeable to a tenant who has retail service, whether the charges are more or less than the amounts of the allowance. (See §§ 905.865 and 905.870.)

**Utility reimbursement.** The amount, if any, by which the utility allowance for tenant-purchased utilities for the unit, if applicable, exceeds the family's total tenant payment.

**Very low-income family.** A low-income family whose annual income does not exceed 50 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families. HUD may establish income limits higher or lower than 50 percent of the median income for an Indian area on the basis of its finding that such variations are



necessary because of unusually high or low family incomes.

**Voluntary equity payments account (VEPA).** A homebuyer account in the Mutual Help Homeownership Opportunity program credited with the amount of any periodic or occasional voluntary payments in excess of the required monthly payments.

**Welfare assistance.** Welfare or other payments to families or individuals, based on need, that are made under programs funded, separately or jointly, by Federal, State or local governments.

**Work item.** Any separately identifiable unit of work constituting a part of a modernization program.

#### **§ 905.105 Types of low-income housing projects.**

IHAs may develop the following types of projects:

(a) **Rental.** In a rental project, the occupants lease units for an initial term acceptable to the IHA and the tenant, followed by a month-to-month tenancy. Projects may be developed with single family detached, duplex, row house, walk-up, garden type, or (for the elderly) elevator structures.

(b) **Mutual Help Homeownership Opportunity—(1) General.** This program (see subpart E) is available only for use by IHAs eligible for assistance under this part. Under this program, a homebuyer enters into an MHO agreement under which the homebuyer agrees to contribute land, labor, cash, materials, or equipment, or a combination of these, for development of the project; make monthly payments based on income; and provide all maintenance of the home. In return, the initial purchase price of the home is reduced each month in accordance with a predetermined purchase price schedule, and the homebuyer is given the right to buy the home by payment of the remaining balance of the purchase price at the time of the purchase. The credit for the homebuyer's Mutual Help contribution is applied against the purchase price of the home.

(2) **Project types.** Single family dwellings are eligible for assistance under this program, including, but not limited to, single-family detached dwellings and row houses.

#### **§ 905.110 Assistance from Indian Health Service and Bureau of Indian Affairs.**

Because HUD assistance under this part is not limited to IHAs of federally recognized Tribes, provisions in this part relating to assistance from BIA or IHS, or to required approvals, actions or determinations by these agencies in connection with such assistance, are applicable only to projects undertaken

by IHAs of federally recognized Tribes or by regional housing authorities created by Alaska state law. These projects shall be developed promptly and operated in accordance with the provisions of this part and the Interdepartmental Agreement. "Federally recognized tribe" means a Tribe recognized as eligible for services from BIA or IHS. HUD is the lead agency for promoting proper coordination under the Interdepartmental Agreement.

#### **§ 905.115 Applicability of civil rights requirements.**

(a) **Indian Civil Rights Act.** (1) The Indian Civil Rights Act (Title II of the Civil Rights Act of 1968, 25 U.S.C. 1301-1303) provides, among other things, that "no Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The Indian Civil Rights Act (ICRA) applies to any tribe, band, or other group of Indians subject to the jurisdiction of the United States in the exercise of recognized powers of self-government. The ICRA is applicable in all cases where an IHA has been established by exercise of Tribal powers of self-government.

(2) In the case of IHAs established pursuant to State law, determinations by HUD of the applicability of the ICRA on a case-by-case basis may consider such factors as the existence of recognized powers of self-government; the scope and jurisdiction of such powers; and the applicability of such powers to the area of operation of a particular IHA. Generally, determinations by HUD of the existence of recognized powers of self-government and the jurisdiction of such powers will be made in consultation with the Department of Interior-Bureau of Indian Affairs, and may consider applicable legislation, treaties and judicial decisions. The area of operation of an IHA may be determined by the jurisdiction of the governing body creating the IHA, any limitations within the enabling legislation, and judicial decisions.

(3) Projects of IHAs subject to the ICRA shall be developed and operated in compliance with its provisions and all HUD regulations and handbooks thereunder.

(b) **Nonapplicability of Title VI and the Fair Housing Act.** Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4), which prohibits discrimination on the basis of race, color or national origin in federally assisted programs, and the Fair Housing Act (42 U.S.C. 3601-3620), which prohibits

discrimination based on race, color, religion, sex or national origin in the sale or rental of housing do not apply to IHAs established by exercise of a Tribe's powers of self-government. HUD regulations implementing Title VI and the Fair Housing Act (24 CFR parts 1 and 100) shall not be applicable to development or operation of projects by such IHAs. Any determination by HUD of the applicability of Title VI and the Fair Housing Act on a case basis shall consider the applicability of the Indian Civil Rights Act under paragraph (a) of this section. Actions taken by an IHA to implement the statutory admission restriction in favor of Indian families in the MH program, as set forth in § 905.416, shall not be considered a violation of any provision of either Title VI or the Fair Housing Act.

(c) **Indian Housing Act of 1988—Mutual Help program admissions.** For provisions generally limiting admission to the Mutual Help Homeownership Opportunity program to Indians and requiring findings of need for admission of non-Indians, see § 905.416.

(d) **Handicap.** For discussion of laws dealing with discrimination on the basis of handicap and with construction accessibility requirements, see § 905.120(f).

(e) **Minority Business Enterprise Development and Women's Business Enterprise Policy.** Executive Orders 12432 (3 CFR, 1983 Comp., p. 198) and 12138 (3 CFR, 1979 Comp., p. 39), respectively, apply to Indian Housing Authorities.

#### **§ 905.120 Compliance with other Federal requirements.**

(a) **Environmental clearance.** Before approving a proposed development program or modernization project, HUD will comply with the requirements of 24 CFR part 50.

(b) **Flood insurance.** HUD will not approve financial assistance for acquisition, construction, reconstruction, repair, or improvement of a building located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the following conditions are met:

(1) Flood insurance on the building is obtained in compliance with Section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(a)); and

(2) The community in which the land is situated is participating in the National Flood Insurance Program in accord with Section 202(a) of the Act (42 U.S.C. 4106(a)), or less than a year has passed since FEMA notification regarding such flood hazards. For this



purpose, the "community" is the jurisdiction that has authority to adopt and enforce flood plain management regulations for the area, such as an Indian Tribe or authorized Tribal organization, an Alaska native village or authorized native organization, or a municipality or county.

(c) *Wage rates for laborers and mechanics.* (1) With respect to construction work on a project, including a modernization project (except for nonroutine maintenance work, as described in paragraph (2) of the definition in § 905.102), the IHA and its contractors shall pay not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a through 276a-5), to all laborers and mechanics (other than volunteers under the conditions set out in 24 CFR part 70) who are employed by an IHA or its contractors for work or contracts over \$2,000.

(2) With respect to all maintenance work on a project, including nonroutine maintenance work (as described in paragraph (2) of the definition in § 905.102) on a modernization project, the IHA and its contractors shall pay not less than the wages prevailing in the locality, as determined or adopted (after a determination under State, Tribal or local law) by HUD pursuant to section 12 of the United States Housing Act of 1937, to all laborers and mechanics (other than volunteers under the conditions set out in 24 CFR part 70) who are employed by an IHA or its contractors.

(3) Prevailing wage rates determined under State or Tribal law are inapplicable under the circumstances set out in § 905.172(b).

(d) *Professional and technical wage rates.* All architects, technical engineers, draftsmen and technicians employed in the development of a project shall be paid not less than the wages prevailing in the locality, as determined or adopted (after a determination under applicable State, Tribal, or local law) by HUD.

(e) *Relocation assistance.* (1) Projects developed by an IHA are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Uniform Act") (42 U.S.C. 4621-4638). Each project shall be developed in compliance with the Uniform Act and HUD policies and requirements thereunder (49 CFR part 24).

(2) Development cost may include the reasonable moving costs for a family which is moved from a project site during construction and is returned to the site after completion.

(f) *Handicap.* (1) Under section 504 of the Rehabilitation Act of 1973 (29 U.S.C.

794), HUD is required to assure that no otherwise-qualified handicapped person is excluded from participation, denied benefits, or discriminated against under any program or activity receiving Federal financial assistance, solely by reason of his or her handicap. IHAs must comply with implementing instructions in part 8 of this title 24.

(2) The IHA shall comply with the Architectural Barriers Act of 1968 (42 U.S.C. 4151-4157), and HUD implementing regulations (24 CFR part 40).

(g) *Access to records; audits.* (1) HUD and the Comptroller General of the United States shall have access to all books, documents, papers, and other records that are pertinent to the activities carried out under this part, in order to make audit examinations, excerpts, and transcripts, in accordance with 24 CFR 85.42.

(2) IHAs that receive financial assistance under this part must comply with the audit requirements of 24 CFR part 44. If an IHA has failed to submit an acceptable audit on a timely basis in accordance with that part, HUD may arrange for, and pay the costs of, the audit. In such circumstances, HUD may withhold, from assistance otherwise payable to the IHA under this part, amounts sufficient to pay for the reasonable costs of conducting an acceptable audit, including, when appropriate, the reasonable costs of accounting services necessary to place the IHA's books and records into auditable condition. The costs to place the IHA's books and records into auditable condition do not generate additional subsidy eligibility under this part.

(h) *Uniform administrative requirements.* The Uniform Administrative Requirements for Grants and Cooperative Agreements to States, Local, and Federally Recognized Indian Tribal Governments, as set forth in 24 CFR part 85, are applicable to grants under this part, except as specified in this part. However, the provisions of § 85.36 have been incorporated in the procurement subpart, subpart B, of this part.

(i) *Lead based paint poisoning prevention.* See 24 CFR part 35 and subpart H of this part.

(j) *Coastal barriers.* In accordance with the Coastal Barriers Resources Act, 16 U.S.C. 3501, no financial assistance under this part may be made available within the Coastal Barrier Resources System.

#### § 905.125 Establishment of IHAs pursuant to State law.

An IHA may be established pursuant to a State law that provides for the establishment of IHAs with all necessary legal powers to carry out low-income housing projects for Indians.

#### § 905.126 Establishment of IHAs by Tribal ordinance.

(a) *Legal capacity of Tribe to establish IHA.* Where an Indian Tribe has governmental police power to promote the general welfare, including the power to create a housing authority, an IHA may be established by Tribal ordinance enacted by the governing body of the Tribe.

(b) *Form of ordinance.* The form of Tribal ordinance shown as appendix I to this subpart A shall be used for the establishment of IHAs by Tribal ordinance on and after March 9, 1976. No substantive change may be made in the form of Tribal ordinance except as indicated by footnotes in Appendix I or with specific written approval from HUD Headquarters.

(c) *Approval or review of ordinance by the Department of the Interior.* HUD shall not enter into an undertaking for assistance to an IHA formed by Tribal ordinance unless such ordinance has been submitted to HUD, accompanied by evidence that the Tribe's enactment of the ordinance either has been approved by the Department of the Interior or has been reviewed and not objected to by that Department.

(d) *Amendment of ordinance.* Tribal ordinances not conforming to current HUD regulations, contracts, and handbooks shall be amended as promptly as possible. No contract or amendment providing any additional commitment for HUD financial assistance shall be entered into unless such conforming amendments have been enacted.

(e) *Submission to HUD of documents establishing IHA.* The Tribal ordinance, evidence of Department of the Interior approval or review, and the following documentation relating to the initial organization of the IHA, in the form prescribed by HUD, shall be submitted to HUD before or with any application for financial assistance:

- (1) Certificate of appointment of Commissioners;
- (2) Commissioner's oath of office;
- (3) Notice of organization;
- (4) Consent to meeting;
- (5) Minutes of meeting;
- (6) Resolutions establishing the IHA, adopting the by-laws, adopting the seal, designating a regular place of meeting, and designating officers;



- (7) By-Laws;
- (8) Certificate of Secretary as to authenticity of documents; and
- (9) General certificate of Housing Authority.

**§ 905.130 IHA commissioners who are tenants or homebuyers.**

(a) *Tenant or homebuyer commissioners.* No person shall be barred from serving on an IHA's Board of Commissioners because he or she is a tenant or homebuyer in a housing project of the IHA. A Commissioner who is a tenant or homebuyer shall be entitled to participate fully in all meetings concerning matters that affect all of the tenants or homebuyers, even though such matters affect him or her as well. However, no such Commissioner shall be entitled or permitted to participate in or be present at any meeting (except in his or her capacity as a tenant or homebuyer), or be counted or treated as a member of the Board, concerning any matter involving his or her individual rights, obligations, or status as a tenant or homebuyer.

(b) *Commissioner as IHA employee.* A member of the IHA's Board of Commissioners shall not be eligible for employment by the IHA, except under extremely unusual circumstances where it is documented that no one except the commissioner is qualified for the position and where the HUD field office approves in advance of the hiring.

**§ 905.135 Administrative capability.**

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of the performance of each IHA, including remote reviews, on-site limited and full reviews, audits, surveys, and the formal Administrative Capability Assessment process, as may be necessary or appropriate to make the determinations required by this section, taking into consideration all available evidence. HUD will evaluate an IHA's compliance in the areas of development, modernization, and operations, including such functions as administration, financial management, occupancy, and maintenance.

(b) *Obligation to maintain.* (1) An IHA must maintain administrative capability at all times throughout the term of the ACC. In order to be considered administratively capable, an IHA must administer the Indian housing program in accordance with applicable statutory requirements, HUD regulations, contracts, HUD handbooks and other program requirements with no serious deficiencies. If any of the following conditions exist, it shall be considered a serious deficiency:

(i) The IHA is not financially stable, based on the most recent Administrative Capability Assessment, annual audit, technical assistance visit, or other reliable information;

(ii) An audit, conducted in accordance with 24 CFR part 44 and with § 905.120 of this part, or HUD reviews (including monitoring findings) reveal deficiencies that HUD reasonably believes require corrective action and/or that corrective actions are not taken in accordance with established timeframes;

(iii) The IHA has management systems that do not meet the standards as set forth in part 85, and the lack of such system may result in mismanagement or misuse of Federal funds;

(iv) The IHA has not conformed to the terms and conditions of previous awards, including for new construction, the Comprehensive Improvement Assistance Program or the use of Operating Subsidies;

(v) The IHA lacks properly trained and competent personnel at key management positions of the IHA; or

(vi) The IHA is in violation of the terms of applicable statutes, regulations, Annual Contributions Contracts or handbooks.

(2) If an IHA has serious deficiencies, HUD shall take any or all of the following actions:

- (i) Issue a notice of deficiency;
- (ii) Issue a corrective action order; or
- (iii) Classify the IHA as "high risk" (see 24 CFR part 85).

(c) *Notice of deficiency.* Based on HUD reviews of IHA performance and findings of any of the deficiencies in paragraph (b)(1) of this section, HUD may issue to the IHA a notice of deficiency, stating the specific program requirements that the IHA has violated and requesting the IHA to take appropriate action. The notification shall be in writing and contain the following:

(1) The deficiencies, i.e., the IHA actions and the statutory, regulatory, handbook or other requirements that have been violated;

(2) Recommended actions that may be taken by the IHA and a timeframe for completion;

(3) The documentation necessary for evidence that all actions have been completed.

(d) *Corrective action order.* (1) Based on HUD reviews of IHA performance and findings of any of the deficiencies described in paragraph (b)(1) of this section, HUD may issue to the IHA a corrective action order. An order may be issued, whether or not a notice of deficiency previously has been issued with regard to the specific deficiency on

which the corrective action order is based. HUD may order corrective action at any time by notifying the IHA of the specific program requirements that the IHA has violated, and by specifying the corrective actions that must be taken. HUD shall design corrective action to prevent a continuation of the deficiency, mitigate any adverse effects of the deficiency to the extent possible, and prevent a recurrence of the same or similar deficiencies.

(2) Before ordering corrective action, HUD will notify the IHA and give it an opportunity to consult with HUD regarding the proposed action.

(3) Any corrective action ordered by HUD shall become a condition of the ACC grant agreement.

(4) The order shall be in writing and shall contain the following:

(i) The deficiencies, i.e., the IHA actions and the statutory, regulatory, handbook or other requirements that have been violated;

(ii) The corrective action(s) that must be taken by the IHA and the time allowed for completing the corrective action(s);

(iii) The method of requesting reconsideration of the HUD action and the documentation necessary to evidence that all corrective actions have been completed.

(e) *Management improvement plan.* (1) When an IHA receives a corrective action order, it must respond to the determination, in writing. This response must include a management improvement plan to correct existing deficiencies. The plan shall describe in detail the method to be used and the time schedule to be maintained, shall be approved by the IHA Board of Commissioners, and is subject to HUD approval.

(2) After receiving the response from the IHA, HUD may direct the IHA to take one or more of the following actions:

(i) Submit additional information:  
(A) Concerning the IHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for the IHA having deficiencies, as described in paragraph (b)(1) of this section;

(B) Explaining any steps the IHA is taking to correct the deficiencies;

(C) Documenting that IHA activities were not inconsistent with the IHA's annual statement or other applicable statutes, regulations, or program requirements;

(ii) Submit schedules for completing the work identified in the MIP;



(iii) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's MIP;

(iv) Not incur financial obligations, or to suspend payments for one or more activities;

(v) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended; or

(vi) Take such other corrective actions as HUD determines appropriate to correct the IHA deficiencies.

(3) HUD shall determine whether the IHA has satisfied, or has made reasonable progress towards satisfying, the management improvement plan.

(4) If the IHA does not satisfy the terms of the plan or does not act in good faith to meet the timeframes included in its MIP, HUD may impose additional restrictions. In addition, existing projects may be terminated, or other action may be instituted, as appropriate.

(f) *High risk determination.* An IHA may be classified as "high risk" and determined ineligible for certain types of future funding related to the classification of risk, or may be determined eligible for future funding but subject to special conditions or restrictions corresponding to the high risk classification. A corrective action order listing the specific violation shall accompany the "high risk" designation.

(1) If an IHA is determined to be high risk, the conditions that form the basis for that determination shall be sufficiently serious to warrant a determination to exclude the IHA from future funding of a particular type. The determination of high risk shall state the cause for that finding.

(2) An IHA may continue to be eligible for funding despite a finding that it is high risk—subject to special conditions and/or restrictions corresponding to the deficiencies found—if it has submitted a management improvement plan that was approved by HUD, and it has exhibited substantial compliance with the plan or a good faith effort to comply with the plan. If HUD determines that it is necessary to impose special conditions or restrictions, it will notify the IHA in writing of the applicable conditions or restrictions. One or more of the following special conditions or restrictions may be imposed:

(i) Submission to HUD of additional documentation;

(ii) Submission to HUD of additional or more detailed financial reports;

(iii) Additional project monitoring from the HUD field office;

(iv) Additional requirements for technical assistance, from HUD or another entity approved by HUD;

(v) Establishing additional approvals by HUD;

(vi) Withholding some or all of the IHA's grant;

(vii) Declaring a breach of the ACC grant amendment with respect to some or all of the IHA's functions; or

(viii) Any other sanction authorized by law or regulation.

(g) *Appeals.* (1) An IHA may appeal a corrective action order or a determination of high risk status to the HUD regional administrator. All appeals must be made in writing, within 30 calendar days of notice to the IHA of the HUD action and must state clearly any justification or evidence that the action is unwarranted or too severe. If an appeal is filed concerning one or more action(s), the action(s) shall not take effect until HUD makes a final determination on the appeal or notifies the IHA that special circumstances exist that warrant giving immediate effect to the announced HUD action. The HUD regional administrator must respond to the appeal within 30 days of receipt of the appeal.

(2) An IHA may appeal a regional administrator's decision to the Assistant Secretary only if the case involves actions related to a determination of ineligibility of funding for the upcoming funding cycle. An appeal of the regional administrator's decision must be made in writing, stating the justification or evidence, and must be received within 21 days of the date of the regional administrator's decision and must be submitted to the Assistant Secretary in writing, stating the justification or evidence upon which the IHA bases its appeal. Decisions reviewed by the Assistant Secretary will be evaluated based on the facts as presented to the regional administrator and on any aggravating or extenuating circumstances.

(3) The IHA's Board of Commissioners must notify the Tribal government of HUD's final determination to withhold or suspend funds or declare a breach of the ACC grant agreement, as well as the basis for, and consequences resulting from, such a determination.

(h) *Superior performance.* HUD may establish levels for superior performance for IHA awards, special initiatives, or participation in other program benefits.

#### § 905.140 Certification of housing managers.

(a) *Purpose and scope.* This section establishes a requirement for the certification of executive directors and housing managers and provides for this certification by approved certifying organizations. The requirements set

forth in this section are applicable to all low-income housing projects assisted under the Act that are owned by IHAs and to all IHAs administering these projects.

(b) *Certification.* (1) Full Certification is granted a housing manager by an approved certifying organization when the organization determines that the person has demonstrated the ability to achieve and/or maintain the essential social, fiscal, environmental, equal opportunity, and administrative goals of the Indian housing program established under the Act, the annual contributions contract, and HUD regulations for the management of Indian housing projects.

(2) Probationary certification is granted to a person who has not met the qualifications for full certification when hired, but who has the potential to qualify. The initial term of probationary certification is one year. The approved certifying organization may extend the term of the probationary certificate for one additional year in order to allow the applicant sufficient time to obtain a certificate. In no case may the probationary certificate be in effect for longer than two years.

(3) Before January 1, 1981, approved certifying organizations were permitted to issue a certification solely on the basis of satisfactory on-the-job performance in the housing management field for not less than 4 years. Certification on this basis is valid only if it was granted before that date.

(c) *HUD approval of certifying organizations.* (1) Any housing management organization may apply to HUD for approval for the purpose of providing certification of individuals as housing managers. HUD's Certification Review Committee will evaluate applicant organizations upon their past performance in the field of Indian housing management and compliance with HUD's nondiscrimination policies, Indian preference, and the suitability of the programs submitted. Every applicant shall submit to HUD appropriate evidence that such organization:

(i) Has the experience and capacity to deal with low-income Indian housing management processes with significant emphasis on housing projects assisted under the Act or assisted under other Federally or State-assisted programs;

(ii) Has developed a certification program which includes:

(A) Specific criteria and standards for qualifying for certification in accordance with paragraph (c)(6) of this section;

(B) Suitable procedures which will afford any person the opportunity to apply for certification and receive



certification if he or she meets the standards;

(C) A right of appeal as set forth in paragraph (i) of this section; and

(D) Suitable procedures which provide for a probationary certificate.

(2) The HUD Certification Review Committee shall evaluate the evidence submitted by the organization in accordance with paragraph (c)(1) of this section and will determine in its discretion, on the basis of that evidence and such other material as may be relevant, whether the qualifications of the organization meet the criteria set forth in paragraph (c)(1) of this section. If the qualifications are satisfactory, HUD shall notify the organization of its approval as a certifying organization.

(3) In the event HUD denies approval of the organization, the notification to the organization shall set forth the reasons for HUD's action in sufficient detail so as to enable the organization to request reconsideration of the determination.

(4) The standards, criteria and program for enabling persons to qualify for certification shall be subject to periodic review and reapproval or disapproval not less than annually by the HUD Certification Review Committee. Such periodic review shall include the procedures and methods by which the organization incorporates in its training, evaluation and certification program the current regulations, policies and procedures of HUD as well as due process protection for the persons certified or applying for certification.

(5) A current list of approved certifying organizations and their standards and criteria shall be published in the *Federal Register* as organizations are approved or reapproved by HUD as certifying organizations, and shall be sent to all IHAs in the form of a notice.

(6) All criteria and standards for qualifying for certification shall be reasonably related to job requirements. The assessment method used to determine whether an individual is qualified for certification (e.g., written examination) shall be based on and relate to a valid analysis of the tasks performed by Indian housing managers and shall be fair, objective, and free of ethnic and cultural bias. HUD approval of assessment methodology may be granted on the basis of a written statement by an organization or individual acceptable to HUD as being qualified in the field of assessment methodology.

(7)(i) Immediately upon receiving notification from HUD that its application to become an approved certifying organization has been

approved, and no longer than 60 days following that notification, an approved certifying organization shall submit to HUD a list of all individuals who already possess a certification from the organization provided:

(A) The certification is reasonable evidence that the certificate holder is qualified as a housing manager, and

(B) The certification is currently recognized by the approved certifying organization at the time the list of names is tendered to HUD.

(ii) Upon receiving this list, HUD will notify the approved certifying organization that the certifications issued to the listed individuals may be considered as satisfying the certification requirements of this section.

(d) *Requirements for certification.* Any person employed as a housing manager of dwelling units shall be required to have certification as a housing manager (either full certification or an unexpired probationary certification) from an approved certifying organization.

(e) *Salaries of housing managers.* Beginning with the budget submitted to HUD for the first fiscal year which starts at least four months after the date on which certification is required for any housing manager, the salary of such any housing manager who has not obtained certification (as described in paragraph (d) of this section) shall not be considered an eligible operating expenditure (whether or not operating subsidy is required), nor shall such salary be approved as a budget item for the purpose of operating subsidy eligibility. However, these prohibitions shall not apply during the pendency of an appeal filed pursuant to paragraph (i) of this section. Beginning with that same fiscal year and thereafter, the current certification status of all housing managers shall be submitted by IHAs to HUD along with the annual budget.

(f) *Compliance with civil service law and notice of termination procedures.* If a housing manager is denied certification or certification is suspended or withdrawn and the person no longer has any appeal pending under this part, the allowance of any salary as an approvable budget item shall terminate, except for such period as may necessarily be involved in compliance by the IHA with notice of termination and related procedures pursuant to State or Tribal law or the IHA's approved personnel practices. Nor shall the allowance of the salary as an approvable budget item terminate if it should be determined as a result of administrative and/or judicial proceedings that under applicable civil service or other State or Tribal laws that

the official's services may not be legally terminated on grounds of his failure to obtain certification under this part.

(g) *Costs of certification and related training.* The reasonable costs incurred by an IHA for certification of an IHA employee as a housing manager (whether or not the certification is required under this part), including training to enable an IHA employee to qualify for such certification, shall be allowable as eligible expenditures for an IHA. The IHA may, at its discretion, include a provision for payment of such costs in its operating budget.

(h) *Denial, revocation or suspension of certification—(1) Grounds for denial, revocation or suspension of certification.* Certification may be denied, revoked or suspended by the approved certifying organization which granted the certification, by its successor, or—if there is no successor certifying organization—by HUD, for the following:

(i) Acts of fraud, deceit or misrepresentation in obtaining the certification;

(ii) Acts of gross negligence, incompetency or misconduct in carrying out the duties of housing manager;

(iii) Conviction of a crime involving moral turpitude; or

(iv) Willful disregard of the regulations and requirements applicable to the Indian housing program.

(2) *Notice by the approved certifying organization.* The approved certifying organization shall serve a written notice on the certified person that denial, revocation or suspension is being considered and shall set forth in the notice with reasonable specificity the reasons for the proposed action. Said notice shall also advise the certified person that he has a specified number of days from receipt of the notice, to respond in writing or to request an informal hearing. If the certified person does not respond within the specified period, the approved certifying organization may revoke or suspend the certification and shall immediately so advise the certified person, the IHA and HUD.

(3) *Presentation of evidence by certified person and determination by the approved certifying organization.* The certified person may examine and, at his expense, copy all documents, records and regulations of the approved certifying organization that are relevant to the matter. The certified person shall have the right to present evidence and arguments in opposition to the proposed revocation or suspension and to controvert evidence relied on by the approved certifying organization and he



or she may elect to do this in writing, or at the informal hearing, or both.

Whenever a certified person requests an informal hearing, he or she shall be entitled to confront in a reasonable manner and cross-examine all witnesses on whose testimony or information the approved certifying organization relies. Evidence pertinent to the issues in the approved certifying organization's notice may be received and considered without regard to its admissibility under rules of evidence employed in judicial proceedings. Upon considering all evidence and arguments presented, the approved certifying organization shall determine whether certification should be revoked or suspended and shall promptly advise the certified persons of its determination. Testimony shall be recorded in some form and such records shall be maintained for a period of not less than 90 days. Whenever the approved certifying organization's decision is to revoke or suspend certification, the notice shall set forth with reasonable specificity the organization's findings. A decision to revoke or suspend certification shall not preclude the approved certifying organization from making subsequent determination that a certified person should be reinstated.

(4) Either the IHA or the housing manager may appeal the determination made by the approved certifying organization pursuant to this section, in accordance with paragraph (i) of this section.

(i) *Appeal.* (1) Any person required to hold certification as a housing manager and who is denied certification or whose certification has been revoked or suspended by an approved certifying organization, may, at his or her option, file an appeal with the approved certifying organization.

(2) The appellant shall have the right to request a hearing. If a hearing is requested, it shall be one at which he or she is represented or accompanied by a person of his or her choice. The appellant shall be afforded an opportunity to present oral testimony and to cross-examine witnesses.

(3) The approved certifying organization shall consider the appeal on the record and on the basis of the evidence presented. The appellant and the person who originally denied certification shall have the right to add to the record affidavits, testimony, or relevant information in support of the certification or in support of the denial, suspension, or revocation of certification. As promptly as possible (generally within 90 days from the filing date of the appeal), the approved certifying organization shall render the

decision on the appeal which states the reasons for the decision. A copy of the decision shall be furnished to the appellant and to HUD.

(4) All materials filed or submitted in regard to an appeal under this section shall be maintained for not less than 90 days following the date of the decision and shall be available for public inspection to the full extent of the law.

#### Appendix I to Subpart A—Tribal Ordinance

Note: The footnotes to Appendix I appear at the end of this appendix.

Pursuant to the authority vested in the \_\_\_\_\_ Tribe by its Constitution, and particularly by Article \_\_\_\_\_, Sections \_\_\_\_\_ thereof, and its authority to provide for the health, safety, morals, and welfare of the Tribe, the Tribal Council of the \_\_\_\_\_ Tribe hereby establishes a public body known as the \_\_\_\_\_ Housing Authority (hereinafter referred to as the Authority), and enacts this ordinance which shall establish the purposes, powers and duties of the Authority.

In any suit, action or proceeding involving the validity or enforcement of or relating to any of its contracts, the Authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this ordinance. A copy of the ordinance duly certified by the Secretary of the Council shall be admissible in evidence in any suit, action or proceeding.

#### Article I—Declaration of Need

It is hereby declared:

1. That there exist on the \_\_\_\_\_ Reservation insanitary, unsafe, and overcrowded dwelling accommodations; that there is a shortage of decent, safe and sanitary dwelling accommodations available at rents or prices which persons of low income can afford; and that such shortage forces such persons to occupy insanitary, unsafe and overcrowded dwelling accommodations.

2. That these conditions cause an increase in and spread of disease and crime and constitute a menace to health, safety, morals and welfare; and that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety protection, fire and accident prevention, and other public services and facilities;

3. That the shortage of decent, safe and sanitary dwellings for persons of low income cannot be relieved through the operation of private enterprises;

4. That the providing of decent, safe and sanitary dwelling accommodations for persons of low income are public uses and purposes, for which money may be spent and private property acquired and are governmental functions of Tribal concern;

5. That residential construction activity and a supply of acceptable housing are important factors to general economic activity, and that the undertakings authorized by this ordinance to aid the production of better housing and more desirable neighborhood and community development at lower costs

will make possible a more stable and larger volume of residential construction and housing supply which will assist materially in achieving full employment; and

6. That the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

#### Article II—Purposes

The Authority shall be organized and operated for the purposes of:

1. Remedying unsafe and insanitary housing conditions that are injurious to the public health, safety and morals;
2. Alleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income; and
3. Providing employment opportunities through the construction, reconstruction, improvement, extension, alteration or repair and operation or low-income dwellings.

#### Article III—Definitions

The following terms, wherever used or referred to in this ordinance, shall have the following respective meanings, unless a different meaning clearly appears from the context:

"Area of Operation" means all areas within the jurisdiction of the Tribe.

"Council" means the \_\_\_\_\_ Tribal Council.

"Federal government" includes the United States of America, the Department of Housing and Urban Development, or any other agency or instrumentality, corporate or otherwise, of the United States of America.

"Homebuyer" means a person(s) who has executed a lease-purchase agreement with the Authority, and who has not yet achieved homeownership.

"Housing project" or "project" means any work or undertaking to provide or assist in providing (by any suitable method, including but not limited to: Rental, sale of individual units in single or multifamily structures under conventional condominium, or cooperative sales contracts or lease-purchase agreements; loans; or subsidizing of rentals or charges) decent, safe and sanitary dwellings, apartments, or other living accommodations for persons of low income. Such work or undertaking may include buildings, land, leaseholds, equipment, facilities, and other real or personal property for necessary, convenient, or desirable appurtenances, for streets, sewers, water service, utilities, parks, site preparation or landscaping, and for administrative, community, health, recreational, welfare, or other purposes. The term "housing project" or "project" also may be applied to the planning of the buildings and improvements, the acquisition of property or any interest therein, the demolition of existing structures, the construction, reconstruction, rehabilitation, alteration or repair of the improvements or other property and all other work in connection therewith, and the term shall include all tangible or intangible assets held or used in connection with the housing project.

"Obligations" means any notes, bonds, interim certificates, debentures, or other forms of obligation issued by the Authority pursuant to this ordinance.



"Obligee" includes any holder of an obligation, agent or trustee for any holder of an obligation, or lessor demising to the Authority property used in connection with a project, or any assignee or assignees of such lessor's interest or any part thereof, and the Federal government when it is a party to any contract with the Authority in respect to a housing project.

"Persons of low income" means persons or families who cannot afford to pay enough to cause private enterprise in their locality to build an adequate supply of decent, safe, and sanitary dwellings for their use.

#### Article IV—Board of Commissioners

1. (a)(1) The affairs of the Authority shall be managed by a Board of Commissioners composed of five persons.

(2) The Board members shall be appointed, and may be reappointed, by the Council. A certificate of the Secretary of the Council as to the appointment or reappointment of any commissioner shall be conclusive evidence of the due and proper appointment of the commissioner.

(3) A commissioner may be a member or non-member of the Tribe, and may be a member or non-member of the Tribal Council.

(4) No person shall be barred from serving on the Board because he is a tenant or Homebuyer in a housing project of the Authority; and such commissioner shall be entitled to fully participate in all meetings concerning matters that affect all of the tenants or Homebuyers, even though such matters affect him as well. However, no such commissioner shall be entitled or permitted to participate in or be present at any meeting (except in his capacity as a tenant or Homebuyer), or to be counted or treated as a member of the Board, concerning any matter involving his individual rights, obligations or status as a tenant or Homebuyer.

(b) The term of office shall be four years and staggered. When the Board is first established, one member's term shall be designated to expire in one year, another to expire in two years, a third to expire in three years, and the last two in four years. Thereafter, all appointments shall be for four years, except that in the case of a prior vacancy, an appointment shall be only for the length of the unexpired term. Each member of the Board shall hold office until his successor has been appointed and has qualified.

(c) The Council shall name one of the Commissioners as Chairman of the Board. The Board shall elect from among its members a Vice-Chairman, a Secretary, and a Treasurer; and any member may hold two of these positions. In the absence of the Chairman, the Vice-Chairman shall preside; and in the absence of both the Chairman and Vice-Chairman, the Secretary shall preside.

(d) A member of the Board may be removed by the appointing power for serious inefficiency or neglect of duty or for misconduct in office, but only after a hearing before the appointing power and duty after the member has been given a written notice of the specific charges against him at least 10 days prior to the hearing. At any such hearing, the member shall have the opportunity to be heard in person or by counsel and to present witnesses in his

behalf. In the event of removal of any Board member, a record of proceedings, together with the charges and findings thereon, shall be filed with the appointing power and a copy thereof sent to the appropriate office of the Department of Housing and Urban Development.

(e) The Commissioners shall not receive compensation for their services but shall be entitled to compensation for expenses, including travel expenses, incurred in the discharge of their duties.

(f) A majority of the full Board (i.e., notwithstanding the existence of any vacancies) shall constitute a quorum for the transaction of business, but no Board action shall be taken by a vote of less than a majority of such full Board.

(g) The Secretary shall keep complete and accurate records of all meetings and actions taken by the Board.

(h) The Treasurer shall keep full and accurate financial records, make periodic reports to the Board, and submit a complete annual report, in written form, to the Council as required by article VII, section 1, of this ordinance.

2. Meetings of the Board shall be held at regular intervals as provided in the bylaws. Emergency meetings may be held upon 24 hours actual notice and business transacted, provided that not less than a majority of the full Board concurs in the proposed action.

#### Article V—Powers

1. The Authority shall have perpetual succession in its corporate name.

2. The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

3. The Authority shall have the following powers which it may exercise consistent with the purposes for which it is established:

(a) To adopt and use a corporate seal.

(b) To enter into agreements, contracts and understandings with any governmental agency, Federal, State or local (including the Council) or with any person, partnership, corporation or Indian Tribe; and to agree to any conditions attached to Federal financial assistance.

(c) To agree, notwithstanding anything to the contrary contained in this ordinance or in any other provision of law, to any conditions attached to Federal financial assistance relating to the determination of prevailing salaries or wages or payment of not less than prevailing salaries or wages or compliance with labor standards, in the development or operation of projects; and the Authority may include in any contract let in connection with a project stipulations requiring that the contractor and any subcontractors comply with requirements as to maximum hours of labor, and comply with any conditions which the Federal government may have attached to its financial aid to the project.

(d) To obligate itself, in any contract with the Federal government for annual

contributions to the Authority, to convey to the Federal government possession of or title to the project to which such contract relates, upon the occurrence of a substantial default (as defined in such contract) with respect to the covenants or conditions to which the Authority is subject; and such contract may further provide that in case of such conveyance, the Federal government may complete, operate, manage, lease, convey or otherwise deal with the project and funds in accordance with the terms of such contract.

Provided, That the contract requires that, as soon as practicable after the Federal government is satisfied that all defaults with respect to the project have been cured and that the project will thereafter be operated in accordance with the terms of the contract, the Federal government shall reconvey to the Authority the project as then constituted.

(e) To lease property from the Tribe and others for such periods as are authorized by law, and to hold and manage or to sublease the same.

(f) To borrow or lend money, to issue temporary or long term evidence of indebtedness, and to repay the same. Obligations shall be issued and repaid in accordance with the provisions of article VI of this ordinance.

(g) To pledge the assets and receipts of the Authority as security for debts; and to acquire, sell, lease, exchange, transfer or assign personal property or interests therein.

(h) To purchase land or interest in land or take the same by gift; to lease land or interests in land to extent provided by law.

(i) To undertake and carry out studies and analyses of housing needs, to prepare housing needs, to execute the same, to operate projects and to provide for the construction, reconstruction, improvement, extension, alteration or repair of any project or any part thereof.

(j) With respect to any dwellings, accommodations, lands, buildings or facilities embraced within any project (including individual cooperative or condominium units): To lease or rent, sell, enter into lease-purchase agreements or leases with option to purchase; to establish and revise rents or required monthly payments; to make rules and regulations concerning the selection of tenants or Homebuyers, including the establishment of priorities, and concerning the occupancy, rental, care and management of housing units; and to make sure further rules and regulations as the Board may deem necessary and desirable to effectuate the powers granted by this ordinance.

(k) To finance purchase of a home by an eligible homebuyer in accordance with regulations and requirements of the Department of Housing and Urban Development.

(l) To terminate any lease or rental agreement or lease-purchase agreement when the tenant or Homebuyer has violated the terms of such agreement, or failed to meet any of its obligations thereunder, or when such termination is otherwise authorized under the provisions of such agreement; and to bring action for eviction against such tenant or Homebuyer.



(m) To establish income limits for admission that insure that dwelling accommodations in a housing project shall be made available only to persons of low income.

(n) To purchase insurance from any stock or mutual company for any property or against any risk or hazards.

(o) To invest such funds as are not required for immediate disbursement.

(p) To establish and maintain such bank accounts as may be necessary or convenient.

(q) To employ an executive director, technical and maintenance personnel and such other officers and employees, permanent or temporary, as the Authority may require; and to delegate to such officers and employees such powers or duties as the Board shall deem proper.

(r) To take such further actions as are commonly engaged in by public bodies of this character as the Board may deem necessary and desirable to effectuate the purposes of the Authority.

(s) To join or cooperate with any other public housing agency or agencies operating under the laws or ordinances of a State or another Tribe in the exercise, either jointly or otherwise, of any or all of the powers of the Authority and such other public housing agency or agencies for the purposes of financing (including but not limited to the issuance of notes or other obligations and giving security therefor), planning, undertaking, owning, constructing, operating or contracting with respect to a housing project or projects of the Authority or such other public housing agency or agencies, so joining or cooperating with the Authority, to act on the Authority's behalf with respect to any or all powers, as the Authority's agent or otherwise, in the name of the Authority or in the name of such agency or agencies.

(t) To adopt such bylaws as the Board deems necessary and appropriate.

4. It is the purpose and intent of this ordinance to authorize the Authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal government in the undertaking, construction, maintenance or operation of any project by the Authority.

5. No ordinance or other enactment of the Tribe with respect to the acquisition, operation, or disposition of Tribal property shall be applicable to the Authority in its operations pursuant to this ordinance.

#### Article VI—Obligations

1. The Authority may issue obligations from time to time in its discretion for any of its purposes and may also issue refunding obligations for the purpose of paying or retiring obligations previously issued by it. The Authority may issue such types of obligations as it may determine, including obligations on which the principal and interest are payable:

(a) Exclusively from the income and revenues of the project financed with the proceeds of such obligations, or with such income and revenues together with a grant from the Federal government in aid of such project;

(b) Exclusively from the income and revenues of certain designated projects

whether or not they were financed in whole or in part with the proceeds of such obligations; or

(c) From its revenues generally. Any of such obligations may be additionally secured by a pledge of any revenues of any project or other property of the Authority.

2. Neither the commissioners of the Authority nor any person executing the obligations shall be liable personally on the obligations by reason of issuance thereof.

3. The notes and other obligations of the Authority shall not be a debt of the Tribe and the obligations shall so state on their face.

4. Obligations of the Authority are declared to be issued for an essential public and governmental purpose and to be public instrumentalities and, together with interest thereon and income therefrom, shall be exempt from taxes imposed by the Tribe. The tax exemption provisions of this ordinance shall be considered part of the security for the repayment of obligations and shall constitute, by virtue of this ordinance and without necessity of being restated in the obligations, a contract between (a) the Authority and the Tribe, and (b) the holders of obligations and each of them, including all transferees of the obligations from time to time.

5. Obligations shall be issued and sold in the following manner:

(a) Obligations of the Authority shall be authorized by a resolution adopted by the vote of a majority of the full Board and may be issued in one or more series.

(b) The obligations shall bear such dates, mature at such times, bear interest at such rates, be in such denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment and at such places, and be subject to such terms of redemption, with or without premium, as such resolution may provide.

(c) The obligations may be sold at public or private sale at not less than par.

(d) In case any of the commissioners of the Authority whose signatures appear on any obligations cease to be commissioners before the delivery of such obligations, the signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if the commissioners had remained in office until delivery.

6. Obligations of the Authority shall be fully negotiable. In any suit, action or proceeding involving the validity or enforceability of any obligation of the Authority or the security therefor, any such obligation reciting in substance that it has been, issued by the Authority to aid in financing a project pursuant to this ordinance shall be conclusively deemed to have been issued for such purpose, and the project for which such obligation was issued shall be conclusively deemed to have been planned, located and carried out in accordance with the purposes and provisions of this ordinance.

7. In connection with the issuance of obligations or incurring of obligations under leases and to secure the payment of such obligations, the Authority, subject to the limitations in this ordinance, may:

(a) Pledge all or any part of its gross or net rents, fees or revenues to which its right then exists or may thereafter come into existence.

(b) Provide for the powers and duties of obligees and limit their liabilities; and provide the terms and conditions on which such obligees may enforce any covenant or rights securing or relating to the obligations.

(c) Covenant against pledging all or any part of its rents, fees and revenues or personal property to which its title or right then exists or may thereafter come into existence or permitting or suffering any lien on such revenues or property.

(d) Covenant with respect to limitations on its right to sell, lease or otherwise dispose of any project or any part thereof.

(e) Covenant as to the obligations to be issued and as to the issuance of such obligations in escrow or otherwise, and as to the use and disposition of the proceeds thereof.

(f) Covenant as to the obligations to be issued and as to the issuance of such obligations in escrow or otherwise, and as to the use and disposition of the proceeds thereof.

(g) Provide for the replacement of lost, destroyed or mutilated obligations.

(h) Covenant against extending the time for the payment of its obligations or interest thereon.

(i) Redeem the obligations and covenant for their redemption and provide the terms and conditions thereof.

(j) Covenant concerning the rents and fees to be charged in the operation of a project or projects, the amount to be raised each year or other period of time by rents, fees and other revenues, and as to the use and disposition to be made thereof.

(k) Create or authorize the creation of special funds for monies held for construction or operating costs, debt service, reserves or other purposes, and covenant as to the use and disposition of the monies held in such funds.

(l) Prescribe the procedure, if any, by which the terms of any contract with holders of obligations may be amended or abrogated, the proportions of outstanding obligations the holders or which must consent thereto, and the manner in which such consent may be given.

(m) Covenant as to the use, maintenance and replacement of its real or personal property, the insurance to be carried thereon and the use and disposition of insurance monies.

(n) Covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition or obligation.

(o) Covenant and prescribe as to events of default and terms and conditions upon which any or all of its obligations become or may be declared due before maturity, and as to the terms and conditions upon which such declaration and its consequences may be waived.

(p) Vest in any obligees or any proportion of them the right to enforce the payment of the obligations or any covenants securing or relating to the obligations.

(q) Exercise all or any part or combination of the powers granted in this section.



(r) Make covenants other than, and in addition to, the covenants expressly authorized in this section, of like or different character.

(s) Make any covenants and do any acts and things necessary or convenient or desirable in order to secure its obligations, or, in absolute discretion of the Authority, tending to make the obligations more marketable although the covenants, acts or things are not enumerated in this section.

#### Article VII—Miscellaneous

1. The Authority shall submit an annual report, signed by the Chairman of the Board, to the Council showing:

- (a) A summary of the year's activities,
- (b) The financial condition of the Authority,
- (c) The condition of the properties,
- (d) The number of units and vacancies,
- (e) Any significant problems and accomplishments,
- (f) Plans for the future, and
- (g) Such other information as the Authority or the Council shall deem pertinent.

2. During his tenure and for one year thereafter, no commissioner, officer or employee of the Authority, or any member of any governing body of the Tribe, or any other public official who exercises any responsibilities or functions with regard to the project, shall voluntarily acquire any interest, direct or indirect, in any project or in any property included or planned to be included in any project, or in any contract or proposed contract relating to any project, unless prior to such acquisition, he discloses his interest in writing to the Authority and such disclosure is entered upon the minutes of the Authority, and the commissioner, officer or employee shall not participate in any action by the Authority relating to the property or contract in which he has any such interest. If any commissioner, officer or employee of the Authority involuntarily acquires any such interest, or voluntarily or involuntarily acquired any such interest prior to appointment or employment as a commissioner, officer or employee, the commissioner, officer or employee, in any such event, shall immediately disclose his interest in writing to the Authority; and such disclosure shall be entered upon the minutes of the Authority, and the commissioner, officer or employee shall not participate in any action by the Authority relating to the property or contract in which he has any such interest. Any violation of the foregoing provisions of this section shall constitute misconduct in office. This section shall not be applicable to the acquisition of any interest in obligations of the Authority issued in connection with any project, or to the execution of agreements by banking institutions for the deposit or handling of funds in connection with a project or to act as trustee under any trust indenture, or to utility services the rates for which are fixed or controlled by a governmental agency, or to membership on the Board as provided in article VI, section 1(a) (4).

3. Each project developed or operated under a contract providing for Federal financial assistance shall be developed and operated in compliance with all requirements of such contract and applicable Federal

legislation, and with all regulations and requirements prescribed from time to time by the Federal Government in connection with such assistance.

4. The Authority shall obtain or provide for the obtaining of adequate fidelity bond for persons handling cash, or authorized to sign checks or certify vouchers.

5. The Authority shall not construct or operate any project for profit.

6. The property of the Authority is declared to be public property used for essential public and governmental purposes and such property and the Authority are exempt from all taxes and special assessments of the Tribe.

7. All property including funds acquired or held by the Authority pursuant to this ordinance shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same nor shall any judgment against the Authority be a charge or lien upon such property. However, the provisions of this section shall not apply to or limit the right of obligees to pursue any remedies for the enforcement of any pledge or lien given by the Authority on its rents, fees or revenues or the right of the Federal Government to pursue any remedies conferred upon it pursuant to the provisions of this ordinance or the right of the Authority to bring eviction actions in accordance with article V, section 3(1).

#### Article VIII—Cooperation in Connection with Projects

1. For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of projects, the Tribe hereby agrees that:

(a) It will not levy or impose any real or personal property taxes or special assessments upon the Authority or any project of the Authority.

(b) It will furnish or cause to be furnished to the Authority and the occupants of projects all services and facilities of the same character and to the same extent as the Tribe furnishes from time to time without cost or charge to other dwellings and inhabitants.

(c) Insofar as it may lawfully do so, it will grant such deviations from any present or future building or housing codes of the Tribe as are reasonable and necessary to promote economy and efficiency in the development and operation of any project, and at the same time safeguard health and safety, and make such changes in any zoning of the site and surrounding territory of any project as are reasonable and necessary for the development of such project, and the surrounding territory.

(d) It will do any and all things, within its lawful powers, necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of projects.

(e) The Tribal Government hereby declares that the powers of the Tribal Government shall be vigorously utilized to enforce eviction of a tenant or

Homebuyer for nonpayment or other contract violations including action through the appropriate courts.

(f) The Tribal Courts shall have jurisdiction to hear and determine an action for eviction of a tenant or Homebuyer. The Tribal Government hereby declares that the powers of the Tribal Courts shall be vigorously utilized to enforce eviction of a tenant or Homebuyer for nonpayment or other contract violations.

2. The provisions of this Article shall remain in effect with respect to any project, and said provisions shall not be abrogated, changed or modified without the consent of the Department of Housing and Urban Development, so long as:

(a) The project is owned by a public body or governmental agency and is used for low-income housing purposes,

(b) Any contract between the Authority and the Department of Housing and Urban Development for loans or annual contributions, or both, in connection with such project, remains in force and effect, or

(c) Any obligations issued in connection with such project or any monies due to the Department of Housing and Urban Development in connection with such project remain unpaid, whichever period ends the latest. If at any time title to, or possession of, any project is held by any public body or governmental agency authorized by law to engage in the development or operation of low-income housing including the Federal government, the provisions of this section shall inure to the benefit of and be enforced by such public body or governmental agency.

#### Article IX—Approval by Secretary of the Interior

With respect to any financial assistance contract between the Authority and the Federal government, the Authority shall obtain the approval of the Secretary of the Interior or his designee.

#### Footnotes

Article I may be modified as deemed appropriate.

Article IV, section 1(a), paragraphs (1), (2) and (3) may be modified. For example, the number of board members may be more or less than five; the appointments may be made by the elected head of the Tribal government, rather than the Council. The IHA may be made a department or division of the Tribal government; membership on the Board may be limited to those who are members of the Tribe, or to those who are nonmembers of the Council, or to a certain number of any category.

Article IV, section 1(b) may be modified to conform to changes in Article IV, section 1(a).



and as to the length of the term of membership.

Article IV, Section 1(c) may be modified as to the manner of appointment of the Chairman. For example, it may provide for appointment by the Board members or by the elected head of the Tribal government. This paragraph may also be modified as to the manner of appointment of the other officials.

Article IV, Section 1(d) may be modified, but adequate safeguards against arbitrary removal shall be included.

Article IV, Section 1(f) may be modified if deemed appropriate where the full Board consists of more than 5 members.

Article VIII, Section 1(f) may be modified to insert the name of the appropriate court, or it may be deleted where it is demonstrated to HUD that the jurisdiction for evictions is vested in other than Tribal courts (e.g., State courts or Courts of Indian Offenses).

## Subpart B—Procurement

### § 905.160 Procurement standards.

(a) *HUD standards*—(1) *Applicability*. This subpart sets forth Federal requirements to be followed by IHAs in the procurement of services, supplies, and goods.

(2) *Contracting authorization*. An IHA may execute contracts without HUD approval for the procurement of work, materials, equipment and/or professional services, in accordance with paragraph (3) (iii) of this section, unless the IHA has been determined to be "high risk", in accordance with 24 CFR part 85 and § 905.135, or a notice of deficiency has been issued with respect to this function. When HUD prior approval is not required, the IHA Board of Commissioners will certify that program requirements have been satisfied before it executes a contract. HUD will monitor IHA performance of this function and may, at any time, issue a notice of deficiency, require prior approval, or require additional training of IHA staff, in accordance with 24 CFR part 85 and § 905.135.

(3) *Limitations*. (i) An IHA shall not award a contract for the project until the prospective contractor has demonstrated, to the satisfaction of the IHA and HUD (when required), the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the contract. The IHA shall not award a contract to a person or firm on the List of Parties Excluded From Federal Procurement and Nonprocurement Programs compiled, maintained and distributed by the General Services Administration (GSA) or to a person or firm that is subject to a limited denial of participation by the HUD Regional Office, Field Office or Office of Indian Programs. The persons listed have been

debarred, suspended, or determined ineligible for participation in Federal programs. (See 24 CFR part 24.)

(ii) Before issuing a solicitation, an IHA shall submit the complete solicitation for HUD approval, or shall certify to HUD its receipt of the required architect's/engineer's certification that the drawings and specifications accurately reflect HUD-approved construction or repair standards and that the solicitation is complete and includes all mandatory items. The IHA shall obtain HUD approval of the proposed award of contracts for repairs, construction, and/or related equipment if the proposed contract award amount exceeds the HUD-approved budget amount or the IHA receives only a single bid. In all other instances, the IHA shall comply with HUD requirements either to submit the proposed award for HUD approval, or if authorized to proceed without specific HUD approval, to make the award after the IHA has certified (A) that the bidding and awarding procedures were conducted in compliance with State, Tribal, or local laws and Federal requirements, including requirements for Indian preference and wage rates; (B) that the award does not exceed the approved budget amount and is not being made on the basis of a single bid; and (C) that HUD clearance has been obtained for the award under previous participation procedures, including absence of the contractor from the GSA List of Parties Excluded From Federal Procurement and Nonprocurement Programs.

(iii) Unless an IHA has been limited with respect to its procurement and management functions in accordance with part 85 and § 905.135, the IHA may execute, or approve any agreement or contract for personal, management, legal, or other services with any person or firm without the prior written approval of HUD, except under the following circumstances:

(A) Where the term of the agreement or contract (including renewal) is in excess of two years; or

(B) Where the amount of the agreement or contract is in excess of the amount included for such purpose in the HUD-approved development cost budget, or operating budget or an amount specified from time to time by HUD, as the case may be; or

(C) Where the agreement or contract is for legal or other services in connection with litigation.

(4) *Records*. An IHA shall maintain records sufficient to detail the significant history of a procurement.

(5) *Contract administration*. An IHA is responsible, in accordance with good

administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement.

(6) *Competition*. All procurement transactions must be conducted in a manner providing full and open competition.

(7) *Contract cost and price*. An IHA must perform a cost or price analysis in connection with every procurement action, including contract modifications.

(b) *IHA standards*—(1) *IHA procedures*. Each IHA shall adopt, promulgate, and comply with, rules or regulations for the procurement and administration of supplies, materials, services and equipment in connection with the development and operation of projects. The IHA will promptly furnish a copy of these rules or regulations to HUD. These rules or regulations shall contain provisions on at least the following subjects:

(i) Procedures for procurement in cases where competitive procurement is required, including written selection procedures;

(ii) Identification (by position title) of IHA officials authorized to enter contracts for, and those authorized to approve, the procurement of goods and services when competitive procurement is not required, and procedures for such procurement;

(iii) Procedures for inventory control;

(iv) Procedures for storage and protection of goods and supplies;

(v) Procedures for issuance of, or other disposition of, supplies and equipment;

(vi) Procedures for implementing Indian preference requirements;

(vii) Procedures for handling complaints and protests regarding procurement;

(viii) Standards of conduct governing IHA directors, board members, officers and employees; and

(ix) Conflict of interest provisions governing directors, officers, employees, contractors/developers and others doing business with the IHA.

(2) *Contract administration system*. An IHA shall maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts and purchase orders.

### § 905.165 Indian preference.

(a) *Applicability*. HUD has determined that projects under this part are subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). (For applicability to an IHA's own employment practices, see 905.360.)



Section 7(b) provides that any contract, subcontract, grant or subgrant entered into for the benefit of Indians shall require that, to the greatest extent feasible—

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or subcontracts be given to "Indians". That Act defines "Indians" to mean persons who are members of an Indian tribe, and defines "Indian tribe" to mean any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(2) Preference in the award of contracts or subcontracts in connection with the administration of contracts be given to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452). That Act defines "economic enterprise" to mean any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that the Indian ownership must constitute not less than 51 percent of the enterprise; "Indian organization" to mean the governing body of any Indian Tribe or entity established or recognized by such governing body; "Indian" to mean any person who is a member of any tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in the Alaska Native Claims Settlement Act; and Indian "Tribe" to mean any Indian Tribe, band, group, pueblo, or community including Native villages and Native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.

(b) *Preference requirements in procurement*—(1) *Preference by contractors and subcontractors.* The methods of procurement set forth in this subpart incorporate procedures for implementing preference for Indians, Indian-owned economic enterprises, and Indian organizations in contracting, subcontracting, training, and employment.

(2) *Preference by IHAs.* (i) To the greatest extent feasible, IHAs shall, in

the conduct of their own operations, adhere to the requirements regarding preference in contracting. Where the provision of preference is determined by an IHA to be infeasible, the IHA shall document in writing the basis for its findings and shall maintain the documentation in its files for three years for HUD review.

(ii) To the greatest extent feasible, preference shall be given to qualified Indians for employment or training for IHA staff positions. Each IHA shall document the method and justification used in selecting individuals for employment or training. A finding by HUD that an IHA has not provided preference to the greatest extent feasible to Indians in selecting individuals for employment or training shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects, as discussed in § 905.135.

(c) *Other preference requirements*—(1) *Use of non-Federal funds.* When both HUD and non-Federal funds are used for a project, the work to be accomplished with the funds should be separately identified, and HUD's Indian preference regulations must be applied to the work financed by HUD. If the funds cannot be separated, HUD's Indian preference regulations will apply to the total project.

(2) *Monitoring.* Each IHA shall be responsible for monitoring Indian preference implementation in its contracting, subcontracting, employment, and training. Should incidents of noncompliance be found to exist, the IHA shall take appropriate remedial action. A finding by HUD that the IHA has not provided adequate monitoring or enforcement of Indian preference may result in a determination by HUD that the IHA is in breach of the ACC or that the IHA lacks administrative capability. Such a finding may constitute grounds for HUD to invoke its remedies under this part or under the ACC, which remedies shall include, but are not limited to, the denial of future projects, as discussed in § 905.135.

(3) *Off-site activities.* Preference in contracting, subcontracting, employment, and training applies not only on-site, on the reservation, or within the IHA's jurisdiction, but also to contracts with firms that operate outside these areas (e.g., employment in modular or manufactured housing construction facilities).

(4) *Locally-imposed requirements.* Each IHA should include in the Invitation For Bids (IFB) or Request For Proposals (RFP) any applicable locally

imposed preference requirements properly enacted by the Tribal governing body, as adopted by the IHA and approved by HUD, or should advise potential offerors to contact the Tribal governing body to determine any applicable preference requirements. However, in no case may an IHA authorize or provide a preference for Indians, Indian-owned economic enterprises, or Indian organizations, based on particular Tribal affiliation or membership.

(5) *Local area residents.* In accordance with section 3 of the Housing and Urban Development Act of 1968, each IHA shall, to the greatest extent feasible, afford preference in contracting, training, and employment to low-income area residents. When the cost of a procurement is estimated to exceed \$500,000, the IHA must include in the IFB or RFP a statement that, "to the greatest extent feasible, opportunities for training and employment [are to] be given low-income residents of the project area and contracts for work in connection with the project [are to] be awarded to business concerns which are located in, or owned in substantial part by persons residing in the area of the project." For this purpose, the project area is usually defined as the Indian reservation. See 24 CFR part 135.

(d) *Required contract clause.* The following language shall be included in any contracts or subcontracts in connection with development or operation of IHA projects (including small purchases):

*Section 7(b) Clause*

(i) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises.

(ii) The parties to this contract shall comply with the provisions of said section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) and all HUD requirements adopted pursuant to section 7(b).

(iii) In connection with this contract, the parties shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned Economic Enterprises, and preferences and opportunities for training and employment to Indians.

(iv) This section 7(b) clause shall be incorporated into every subcontract in connection with the project.



(v) Upon a finding by the IHA or HUD that any party to this contract is in violation of the section 7(b) clause, said party shall at the direction of the IHA, take appropriate remedial action pursuant to the contract.

(e) *Eligibility for Indian preference*—

(1) An applicant seeking to qualify for preference in contracting or subcontracting shall submit proof of Indian ownership to the IHA or contractor. Proof of Indian ownership shall include, but shall not be limited to:

(i) Certification by a Tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. IHAs shall accept the certification of a Tribe that an individual is a member.

(ii) Evidence such as stock ownership, structure, management, control, financing and salary or profit sharing arrangements of the enterprise.

(2) An applicant seeking to qualify for preference in employment and training shall submit, to the IHA or contractor, certification by a Tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. IHAs and contractors shall accept the certification of a Tribe that an individual is a member.

(3) A potential offeror seeking a contract or a subcontract shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or the contractor, as appropriate, that the potential offeror has the technical, administrative, and financial capability to perform contract work of the size and type involved, and within the time provided, under the proposed contract. A potential offeror seeking employment and training shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or the contractor, as appropriate, that the potential offeror possesses the qualifications required for employment or training.

(4) An IHA may state in its solicitation that bidders must submit evidence of eligibility within a specified time period before a scheduled bid opening.

(5) An IHA may use lists of pre-qualified Indians, Indian enterprises, or Indian organizations, provided that the IHA does not preclude potential offerors from qualifying during the solicitation period.

(6) If an IHA or contractor determines that a potential offeror is ineligible for Indian preference, the IHA or contractor shall so notify the potential offeror in writing before the award of the contract or before filling the position or providing the training sought by the potential offeror.

(f) *Review procedures for complaints alleging inadequate or inappropriate*

*provision of preference.* The following complaint procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this subpart, including alternate methods enacted and approved in the manner described in this subpart.

(1) Each complaint (including complaints against an IHA) shall be in writing, signed, and filed with the IHA. Complaints may be filed only by a person or business entity claiming to have been adversely affected by the actions or inactions of an IHA, a contractor or subcontractor in connection with the provision of preference to Indians in contracting, subcontracting, employment or training.

(2) A complaint must be filed with the IHA no later than 20 calendar days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the IHA shall promptly stamp the date and time of receipt upon the complaint, acknowledge its receipt in writing to the complainant within ten calendar days, and shall investigate, and within 20 calendar days shall either meet, or communicate by mail or telephone, with the complaining party in an effort to resolve the matter. In all cases, but especially where the complaint indicates that expeditious action is required to preserve the rights of the complaining party, the IHA shall endeavor to resolve the matter as expeditiously as possible. If noncompliance with Indian preference requirements is found to exist, the IHA shall take appropriate steps to remedy the noncompliance and, if necessary, to amend its procedures so as to be in compliance. If the matter is not resolved to the satisfaction of the complaining party, or if the IHA has failed to communicate with the complaining party in an effort to resolve the complaint within 20 calendar days following the IHA's receipt of a complaint, the complaining party may file a written complaint with the appropriate Indian Field Office of HUD. In any event, complaints filed with HUD must be received within six months after the occurrence of the alleged adverse action by the IHA, contractor or subcontractor. The address of the Indian Field Office and the name of the appropriate Indian program officer shall be included in the initial communication from the IHA acknowledging receipt of the complaint.

(4) Upon receipt of a written complaint, the HUD Indian Field Office will request that the IHA provide a written report setting forth all relevant facts, including, but not limited to:

(i) The date the complaint was filed with the IHA;

(ii) The name of the complainant;

(iii) The nature of the complaint, including the manner in which Indian preference was or was not provided; and

(iv) Actions taken by the IHA in addressing or resolving the complaint. The IHA shall provide copies of its report and all relevant documents concerning the complaint to HUD within ten calendar days after receipt of the HUD request.

(5) Upon receipt of the IHA's report, the HUD Indian Field Office will determine whether the actions taken by the IHA comply with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act, and with Indian preference requirements under this part. Notification of the Field Office's determination shall be provided to the IHA and to the complaining party, orally or in writing, no later than 30 calendar days following HUD's receipt of the complaint. If the notice is oral, it shall be promptly confirmed in writing. If the complaining party's alleged injury will occur during this 30-day period, the HUD Indian Field Office will make a good faith effort to make its determination before the occurrence of such injury (e.g., contract award).

(6) Where the HUD Indian Field Office determines on the basis of the facts provided by the IHA and on the basis of other available information that there has been noncompliance with Indian preference requirements, the Field Office shall instruct the IHA to take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance.

(7) The decision of the HUD Indian Field Office may be appealed to the Assistant Secretary for Public and Indian Housing. The decision of the Assistant Secretary for Public and Indian Housing shall constitute final agency action for purposes of the Administrative Procedure Act.

**§ 905.170 Other requirements applicable to development contracts.**

(a) *Bonding requirements.* For construction contracts for more than \$100,000, each contractor shall be required to provide adequate assurance of performance and payment acceptable to HUD. "High risk" IHAs may be required to obtain prior HUD approval of the form of assurance.

(1) The following methods may be used to provide this assurance:

(i) Performance and payment bond for 100 percent of the total contract price.



(ii) Deposit with the IHA of a cash escrow of not less than 20 percent of the total contract price, subject to reduction, with the approval of HUD during the warranty period, commensurate with potential risk.

(iii) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the IHA, subject to reduction, with the approval of HUD, during the warranty period commensurate with potential risk.

(iv) Letter of credit for 10 percent of the total contract price and compliance with the procedures for monitoring of disbursements by the contractor, as approved by HUD.

(2) In the case of a Mutual Help project, the term total contract price as used with respect to each of the above assurance methods includes the value of all Mutual Help contributions for work, materials, or equipment to be provided to the contractor for use in performing the contract work.

(3) The solicitation shall fully set forth all elements of the approved method, or approved alternative methods, for providing assurance of performance. After award of the contract, and within ten calendar days after the prescribed contract forms are presented for signature, the successful bidder shall furnish to the IHA the assurance required under the method to be used.

(b) *Executive Order 11246 (equal employment opportunity)*. (1) Contracts for construction work in connection with Projects under this part are subject to Executive Order 11246 (30 FR 12319), as amended by Executive Order 12319 and Executive Order 11375 (32 FR 14303), and to applicable implementing regulations (24 CFR part 130; 41 CFR chapter 60), rules, and orders of HUD and the Office of Federal Contract Compliance Programs of the Department of Labor. Executive Order 11246 prohibits discrimination and requires affirmative action to ensure that employees or applicants for employment are treated without regard to their race, color, religion, sex, or national origin.

(2) Compliance with E.O. 11246, and related regulations, orders and requirements shall be to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act.

#### § 905.172 Wage rates.

(a) *Determination of prevailing wage rates*. For the applicable method of determination of the prevailing wage rates to be paid laborers and mechanics, see § 905.120(c).

(b) *Preemption of prevailing wage rates*. (1) A prevailing wage rate

determined under State or Tribal law shall be inapplicable to a contract or IHA-performed work item for the development, maintenance or modernization of a project whenever:

(i) The contract or the work item is otherwise subject to State or Tribal law requiring the payment of wage rates determined by a State, local, or Tribal government or agency to be prevailing and is for a project assisted with funds for low-income housing under the Act; and

(ii) The wage rate (the basic hourly rate and any fringe benefits) determined under State or Tribal law to be prevailing with respect to an employee in any trade or position employed in the development, maintenance, or improvement of a project exceeds whichever of the following Federal wage rates is applicable:

(A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*) to be prevailing in the locality with respect to such trade;

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(D) The wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(2) For the purpose of ascertaining whether a wage rate determined under State or Tribal law for a trade or position exceeds the Federal wage rate:

(i) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State or Tribal law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the Secretary of Labor or apprentice or trainee wage rate; and

(ii) Where a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State or Tribal law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(3) Whenever paragraph (b)(1)(i) is applicable:

(i) Any solicitation issued by the IHA and any contract executed by the IHA for development, maintenance or modernization of the project shall include a statement as prescribed in this paragraph and failure to include this statement may constitute grounds for

requiring resolicitation. The statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or Tribal law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract must be included whenever either of the following occurs:

(A) Such nonfederal prevailing wage rate exceeds:

(1) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*) to be prevailing in the locality with respect to such trade;

(2) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency, or

(3) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(B) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(ii) The IHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State or Tribal law and described in paragraph (b)(2) of this section to any of its own employees who may be engaged in the development, maintenance or modernization of the project; and

(iii) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State or Tribal law and described in paragraph (b)(2) of this section shall be enforced against the IHA or any of its contractors or subcontractors with respect to employees engaged in the contract or IHA-performed work item for development, maintenance or modernization of the project.

(4) Nothing in this paragraph (b) shall affect the applicability of any wage rate established in a collective bargaining agreement with an IHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (b)(1)(ii) of this section, nor does this paragraph (b) impose a ceiling on wage rates an IHA or its contractors or subcontractors may choose to pay independent of State law.



(5) The provisions of this paragraph (b) shall apply to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of an IHA on or after October 6, 1988.

**§ 905.175 Methods of procurement.**

(a) *General*—(1) *Method of providing Indian preference.* This section outlines specific methods an IHA must follow in the procurement of services, supplies and other property. These methods provide, to the greatest extent feasible, preference to Indian organizations and Indian-owned economic enterprises in contracting and subcontracting, and to Indians in employment and training. If a Tribal governing body enacts an alternate method of providing Indian preference within its jurisdiction and the Secretary approves the alternate method as meeting the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act for use in the HUD-assisted Indian housing program, the IHA under that jurisdiction must implement the alternate method in lieu of the methods specified in this section. (For purposes of this section, "Tribal governing body" means the governing body of an Indian Tribe, as defined in § 905.102, which exercises powers of self-government and is Federally recognized.) Alternate methods that provide for a Tribal preference will not be approved. HUD's review of alternate methods of providing preference will include the extent to which the proposed method minimizes the risk of nonperformance, promotes competition, assures cost containment, reduces administrative burdens and furthers local priorities and objectives while providing effective Indian preference.

(2) *Requirements applicable to all contracting.* (i) In all cases, the IHA shall include in the Invitation For Bids (IFB) or Request For Proposals (RFP) a description of the contracting and subcontracting procedures that are to be employed. A finding by an IHA either that a subcontract was awarded without using the procedure required by the IHA, or that the contractor falsely represented that subcontracts would be awarded to Indian enterprises or organizations, shall be grounds for termination of the contract between the IHA and its contractor, or for other penalties as appropriate. These grounds for termination of the contract or for the imposition of other penalties shall be set out in the IFB or RFP and shall be included in each contract and subcontract.

(ii) Each IFB and RFP shall state whether the IHA maintains lists of Indian-owned economic enterprises and Indian organizations by specialty (e.g., plumbing, electrical, foundations), which are available to developers, contractors, and subcontractors to assist them in meeting their responsibility to provide preference in connection with the administration of contracts and subcontracts.

(iii) The IHA shall require a statement from all prospective contractors or developers describing how they will provide Indian preference in the award of subcontracts. Each IHA shall describe in its IFB or RFP (A) what provisions each prospective developer or contractor must include in its statement and (B) the factors that will be used by the IHA in judging the statement's adequacy. Any offer that fails to include the required statement shall be rejected as nonresponsive or unacceptable. However, a prospective contractor or developer that has prepared the statement but inadvertently has failed to include it in the offer may be allowed to cure the deficiency by submitting the statement within five working days of notification of its omission. An IHA may require that a comparable statement be provided by subcontractors to their contractors, and may require a contractor to reject any offer by a subcontractor that fails to include the statement, as specified by the IHA in the IFB or RFP.

(iv) Each contractor or subcontractor shall submit a certification (supported by credible evidence) to the IHA in any instance where the contractor or subcontractor believes it is infeasible to provide Indian preference in subcontracting. The IHA may examine the evidence submitted and may accept or reject the certification.

(b) *Small purchase procedures*—(1) *General.* As an alternative to the procurement procedures specified in paragraphs (c), (d) and (e) of this section, this paragraph provides for simplified, informal procurement methods applicable to an IHA's procurement of services, supplies or other personal property that do not cost more than \$25,000 in the aggregate (paragraph (2)).

(i) The provisions of § 905.165 concerning Indian preference apply to small purchase procedures, except as otherwise specified in this section. In providing preference, an IHA shall seek maximum participation by Indian-owned economic enterprises and Indian organizations and shall to the extent available, refer to lists of qualified Indian supply sources.

(ii) The IHA shall require a statement from all contractors agreeing to provide Indian preference in subcontracting, training and employment and shall specify the method to be used.

(iii) An IHA must document its efforts in providing Indian preference. If no quotations are solicited or received from Indian-owned economic enterprises or Indian organizations, the IHA must also include as part of its documentation a statement explaining the reasons for the lack of Indian participation.

(2) *Methods of procurement—\$25,000 or less.* For purchases aggregating no more than \$25,000, an IHA may use the methods set forth in this paragraph or the more formal procedures set forth in paragraphs (c) and (d).

(i) *Solicitation.* (A) An IHA may solicit quotations by telephone, letter or other informal procedure provided that the manner of solicitation provides for participation by a reasonable number of competitive sources. At the time of solicitation, the parties must be informed of the item to be procured with sufficient specificity, of the time within which quotations must be submitted, and of the information that must be submitted with each quotation. Quotations must be obtained in writing. A written quotation may include a confirmation of a previous oral quotation only if it is submitted within ten calendar days of the oral quotation, or by the closing date for submitting quotations, as determined by the IHA.

(B) An IHA shall attempt to obtain quotations from a minimum of three qualified sources in order to promote competition to the maximum extent practicable. Fewer than three quotations is acceptable when the IHA has attempted but has been unable to obtain a sufficient amount of competitive quotations. In unusual circumstances, the IHA may accept the sole quotation received in response to a solicitation. In all cases, an IHA shall document the circumstances when it has been unable to obtain at least three quotations.

(ii) *Award.* (A) Where the contract is to be awarded based upon price and specifications that are not subject to negotiation, the IHA shall award the contract to the qualified Indian-owned economic enterprise or organization with the lowest responsive quotation if it is reasonable and no more than 10 percent higher than the quotation of the lowest responsive quotation from any qualified source. If no responsive quotation by a qualified Indian-owned economic enterprise or organization is within 10 percent of the quotation of the lowest responsive quotation from any



qualified source, award shall be made to the source with the lowest quotation.

(B) Where the contract is to be awarded based on factors other than price, the IHA shall issue a request for quotations by developing the particulars of the solicitation, including a rating system for the assignment of points to evaluate the merits of each quotation. The solicitation shall identify all factors to be considered, including price or cost. The IHA shall set aside 15 percent of the total number of available rating points for the provision of Indian preference. Award shall be made to the best quotation, as determined and documented under the rating system.

(c) *Procurement by sealed bids (Invitations for Bid)*. Preference in the award of contracts and subcontracts using sealed bidding (e.g., conventional bid construction contracts, material supply contracts) shall be provided as follows:

(1) The IFB may be restricted to qualified Indian-owned economic enterprises and Indian organizations. The IFB should, however, not be so restricted unless the IHA has a reasonable expectation that the required minimum number of qualified Indian-owned economic enterprises or organizations are likely to submit responsive bids. If two or more (or at the IHA's option, a number greater than two specified in the IFB) qualified Indian-owned economic enterprises or organizations submit responsive bids, award shall be made to the qualified enterprise or organization with the lowest responsive bid. If fewer than the minimum required number of qualified Indian-owned economic enterprises or organizations submit responsive bids, the IHA shall reject all bids, and shall advertise and issue the IFB in accordance with paragraph (c)(2) of this section. Subject to HUD approval, the IHA may accept a single bid where the IHA determines that the single bid received is of a fair and reasonable price, or the IHA determines that delays caused by readvertising would subject the project to higher construction costs.

(2) If the IHA prefers not to restrict the IFB as described in paragraph (c)(1), above; or if an insufficient number of qualified Indian-owned economic enterprises or organizations submit responsive bids in response to an IFB under paragraph (c)(1); or if a single bid is not accepted and approved; the IHA or contractor shall advertise and issue an invitation for bids from non-Indian as well as Indian-owned economic enterprises and Indian organizations. Award shall be made to the qualified Indian-owned economic enterprise or organization with the lowest responsive

bid if that bid (i) is within the maximum total contract price established for the specific project or activity for which the IFB has been issued and (ii) is no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder. "X" is determined as follows:

	X=lesser of:
When the lowest responsive bid is less than \$100,000.	10% of that bid, or \$9,000.
When the lowest responsive bid is:	
At least \$100,000, but less than \$200,000.	9% of that bid, or \$16,000.
At least \$200,000, but less than \$300,000.	8% of that bid, or \$21,000.
At least \$300,000, but less than \$400,000.	7% of that bid, or \$24,000.
At least \$400,000, but less than \$500,000.	6% of that bid, or \$25,000.
At least \$500,000, but less than \$1 million.	5% of that bid, or \$40,000.
At least \$1 million, but less than \$2 million.	4% of that bid, or \$60,000.
At least \$2 million, but less than \$4 million.	3% of that bid, or \$80,000.
At least \$4 million, but less than \$7 million.	2% of that bid, or \$105,000.
\$7 million or more.....	1 1/2% of the lowest responsive bid, with no dollar limit.

If no responsive bid by a qualified Indian-owned economic enterprise or organization is within the stated range of the total bid price of the lowest responsive bid from any qualified enterprise, award shall be made to the bidder with the lowest bid.

(d) *Procurement by competitive proposals (Request for Proposals)*. (1) Preference in the award of contracts and subcontracts that are let under competitive proposals/Request for Proposals (RFP) process (e.g., for turnkey proposal construction contracts, professional service contracts) shall be provided as follows:

(i) The RFP may be restricted to qualified Indian-owned economic enterprises and Indian organizations. The RFP should, however, not be so restricted unless the IHA has a reasonable expectation that the required minimum number of qualified Indian-owned economic enterprises or Indian organizations are likely to submit responsive proposals. If two (or, at the IHA's option, a number greater than two specified in the RFP) qualified Indian-owned economic enterprises or Indian organizations submit responsive proposals, award shall be made to the qualified Indian-owned economic enterprise or Indian organization with the best proposal. If fewer than the

minimum required number of qualified Indian-owned economic enterprises or Indian organizations submit responsive proposals, the IHA shall reject all proposals and shall advertise and issue the RFP in accordance with paragraph (d)(1)(ii) of this section. Subject to HUD approval, the IHA may accept a proposal that is the only one received where the IHA determines that delays caused by readvertising would cause higher costs, or where the IHA determines that the proposal is fair and reasonable. The IHA shall develop the evaluation criteria concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of proposals received. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance the IHA places on each evaluation factor and subfactor. The award shall be made to the qualified Indian-owned economic enterprise or Indian organization that has submitted the most responsible proposal if the proposal is within the maximum total contract price established for the specific project or activity.

(ii) If the IHA prefers not to restrict the RFP solicitation as described in paragraph (d)(1)(i), above; or if an insufficient number of qualified Indian enterprises or organizations satisfactorily respond under that procedure; or if a single proposal is not accepted and approved; the IHA or contractor shall advertise and issue a request for proposals from non-Indian as well as Indian-owned economic enterprises and Indian organizations. The IHA shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance an IHA places on each evaluation factor and subfactor. Notification that Indian preference is applicable to this procurement shall be included in the RFP. The award shall be made to the most responsible proposal if the proposal is within the maximum total contract price established for the specific project or activity.

(2) An IHA shall set aside 15 percent of the total number of available rating points for the provision of Indian preference in the award of contracts and subcontracts. The percentage or number of points set aside for preference and



the method for allocating these points shall be specified in the RFP.

(3) An IHA may require that contractors solicit subcontractors by using a RFP based on a point system, and that contractors set aside 15 percent of the available rating points for the provision of Indian preference in subcontracting. The RFP shall explain the criteria to be used by the contractor in evaluating proposals submitted by subcontractors.

(e) *Procurement by noncompetitive proposals.* The IHA may award a contract by seeking a contractor without satisfying the small purchase, sealed bids or competitive proposals requirements for competition only if award under them is infeasible, one of the following applies:

(1) The exigencies require immediate delivery of the articles or performance of the service;

(2) Only one source of supply is available and the purchasing or contracting officer of the IHA has so certified;

(3) After solicitation of a number of sources, competition is determined inadequate; or

(4) HUD has specifically authorized this method.

#### § 905.180 Training and employment requirements.

(a) *Sealed bidding (IFB).* (1) For contracts awarded using sealed bidding, the Invitation for bids (IFB) shall state that each contractor and subcontractor must include in its bid response:

(i) A statement detailing its employment and training opportunities and its plans to provide preference to Indians in implementing the contract; and

(ii) The number or percentage of Indians anticipated to be employed and trained. The IFB shall explain the criteria to be used by the IHA or the contractor in evaluating contractor or subcontractor statements.

(2) Any bid that fails to include the required statement, or that includes a statement that does not meet minimum standards required by the IHA or contractor (as appropriate) shall be rejected as nonresponsive. However, a bidder who has prepared a statement that satisfies the standards but inadvertently has failed to include it in the bid, may be allowed to cure the deficiency by submitting the statement within five working days of notification of its omission.

(3) Failure to comply with the submitted statement shall be grounds for termination of the contract for default or for the assessment of penalties or other remedies. The IFB and

the contract shall describe the actions that may be taken by an IHA for noncompliance with the undertakings set out in the contractor's or subcontractor's statement.

(4) A finding by HUD that an IHA has entered into a contract that failed to include an acceptable statement on preference in employment and training shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(b) *Competitive proposals (RFP).* (1) For contracts awarded using competitive proposals, the request for proposals (RFP) shall state that each contractor and subcontractor must include in its proposal response:

(i) A statement detailing its employment and training opportunities and its plan to provide preference to Indians in implementing the contract; and

(ii) The number or percentage of Indians anticipated to be employed and trained. The RFP shall explain the criteria to be used by the IHA or the contractor in evaluating contractor or subcontractor statements.

(2) For contracts awarded under an RFP restricted to qualified Indian-owned economic enterprises and Indian organizations, any proposal that fails to include the required statement, or that includes a statement that does not meet minimum standards required by the IHA or contractor (as appropriate), shall be rejected. However, an offeror who has prepared a statement, that satisfies the standards but inadvertently has failed to include it in the offer, may be allowed to cure the deficiency by submitting the statement within five working days of notification of its omission. For contracts awarded under an RFP not so restricted, the RFP shall state that, as a mandatory threshold requirement, a proposal must contain the statement or the proposal will be rejected without further evaluation. If the statement is present, a maximum of up to ten percent of the total points available during evaluation of the proposal shall be awarded on the basis of the content of the statement. (These points are in addition to and separate from any points awarded for the provision of Indian preference in contracting or subcontracting in accordance with § 905.175.)

(3) Failure to comply with the submitted statement shall be grounds for termination of the contract for default or for the assessment of penalties or other remedies. The RFP and the contract shall describe the actions that may be taken by an IHA for

noncompliance with the undertakings set out in the contractor's or subcontractor's statement.

(4) A finding by HUD that an IHA has entered into a contract that failed to include an approved statement in implementing preference in employment and training opportunities shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(c) *Provisions on employment or training applicable to all contracts.* The IHA shall require contractors and subcontractors to provide preference to the greatest extent feasible by hiring qualified Indians in all positions other than core crew positions, except where the contractor adequately advertises a position and no Indian either qualifies or accepts the terms of employment. The IHA shall indicate what it considers to be adequate advertisement in the IFB or RFP (as appropriate) and in the contract. A core crew employee is an individual who is—

(1) A bona fide employee of the contractor or subcontractor at the time the bid or proposal is submitted; or

(2) An individual who was not employed by the contractor or subcontractor at the time the bid or proposal was submitted, but who is regularly employed by the contractor or subcontractor in a supervisory or other key skilled position when work is available. Each contractor shall submit a list of all core crew employees with its bid or proposal. See also 24 CFR part 135, regarding preference for low-income area residents.

#### § 905.185 Government-wide contract requirements.

A HUD regulation found at 24 CFR part 85 embodies government-wide administrative requirements for grants to State, local and Federally recognized Indian Tribal governments. The contract provisions listed in § 85.36(i) of that regulation are to be included in any IHA contracts.

#### Subpart C—Development

##### § 905.201 Roles and responsibilities of Federal agencies.

HUD, IHS, BIA, and other appropriate agencies shall coordinate functions in accordance with the Interdepartmental Agreement. HUD shall take the lead role in any area specifically related to the construction of Indian housing under this part.

##### § 905.205 Allocation.

HUD will allocate funds to Indian field offices using a systematic process



that considers the relative need for housing in each Region or other geographic area, based on the most recent and reliable data available. See 24 CFR part 791, subpart D.

#### § 905.210 Development priorities.

(a) Development of new units will be permitted instead of acquisition of existing housing, whenever the IHA demonstrates that the cost of new construction would be less than the cost of acquiring existing housing or acquiring and rehabilitating existing housing (including the reserve for major repairs in an acquired rental project) or the IHA demonstrates that there is no suitable existing housing to acquire in the area.

(b) Among proposed development projects, HUD will give priority to projects consisting of housing suitable for large families (three or more bedrooms).

#### § 905.212 Authority for proceeding without HUD approval.

(a) *IHA authority to proceed.* An IHA's authority to proceed with development functions without obtaining HUD approval may be affected by a HUD finding concerning the IHA's previous performance. If, with respect to development functions, the IHA has been determined, before program reservation, to be "high risk," in accordance with § 905.135, or has been issued a notice of deficiency after program reservation, HUD approval will be required before any of the major development steps, such as preparation of plans, advertisement of a solicitation, execution of a construction contract, or inspection of ongoing or completed construction, is taken.

(b) *Rescinding HUD authorization.* At any time during the development process, HUD may monitor performance of the development functions. HUD may issue a letter of deficiency to the IHA and require the submission of a management improvement plan to correct the concerns, including requiring additional training of IHA staff as a condition of continued authorization to certify adherence to applicable requirements.

#### § 905.215 Production methods and requirements.

(a) *Choice and approval of production method.* The IHA shall state on the application for a project its choice of one of the production methods described in this section and, if the method selected is force account, its justification in accordance with paragraph of (a) (6) of this section. If HUD disapproves the IHA's preferred development method, it

will furnish a statement of its reasons to the IHA.

(1) *Conventional method.* Under the Conventional method, the IHA plans the project and prepares drawings and specifications. After the plans and specifications are approved as described in § 905.260, the IHA solicits competitive bids through public advertisement and awards the contract to the lowest responsible bidder. The contractor shall be required to provide completion assurance in the form of a 100 percent performance and payment bond or, in accordance with 24 CFR 85.36(h), a lesser percentage or other security. Prior approval by HUD of the form of assurance is required for an IHA determined to be "high risk." The contractor receives progress payments during construction, and a final HUD-approved payment upon completion in accordance with the contract.

(2) *Turnkey method.* Under the Turnkey method, the IHA advertises for developers to submit proposals to build a project described in the IHA's invitation for proposals. The invitation for proposals may prescribe the sites to be used. The IHA evaluates the proposals and selects the best proposal after considering price, design, site, the developer's experience and other evidence of the developer's ability to complete the project. For a "high risk" IHA or one found to have deficiencies for this function, HUD may require concurrence in selection of a proposal. After the proposal is selected by the IHA, the IHA may award the contract to the successful developer, who prepares working drawings and specifications unless previously provided by the IHA. The IHA and the developer enter into a contract of sale after the drawings and specifications are reviewed by HUD as required under § 905.260. Upon completion of the project (or stages thereof) in accordance with the contract of sale, the IHA purchases the project (or stage) from the developer. The IHA may contract for assistance in preparing the invitation and evaluating proposals. The IHA must obtain independent inspection services by an architect, engineer or other qualified person during construction. The IHA must require the developer to furnish completion assurance in the form of 100 percent performance and payment bonds, or other security as approved by HUD in accordance with 24 CFR 85.36(h), consistent with the provisions of State law.

(3) *Modified Turnkey.* Under this modified method, the procedure is the same as under the conventional method, except that:

(i) The developer/contractor will receive no progress payments from the IHA and will be responsible for acceptable completion before receiving any payment from the IHA; and

(ii) In accordance with 24 CFR 85.36(h), the IHA may require the developer/contractor to furnish assurance in the form of a 100 percent performance and payment bond, or other security as may be approved by HUD. The IHA's decision whether or not to require bonding or other security shall be included in the invitation for bids or proposals.

(4) *Self-Help.* The Self-Help method is applicable only to the Mutual Help Homeownership Opportunity program. Under this method, a small group of families builds, with technical assistance and supervision and materials provided by the IHA, a substantial portion of the homes to be purchased by the families in the group. Their work is supplemented by skilled labor obtained under contract. See subpart F for more details concerning this method.

(5) *Acquisition of existing housing (with or without rehabilitation).* Under the Acquisition method, the IHA purchases existing housing that may need only minor repairs or that may require substantial rehabilitation. Repair or rehabilitation may be accomplished before acquisition using Turnkey procedures or after acquisition using Conventional or Force Account procedures. An ACC may be executed before site approval, provided the IHA demonstrates to the satisfaction of the HUD field office that adequate sites are available to cover the units contained in the program reservation.

(6) *Force account method.* (i) Under the Force Account method, an IHA performs construction or rehabilitation using its own work force, either entirely or in combination with contractors. See § 905.260 concerning final working drawings.

(ii) The Force Account method may be used only if justified by the IHA and approved by the HUD field office. The IHA must demonstrate that it has the technical and administrative capabilities to complete the project within the projected time and budget. The HUD field office shall require that a Tribe or IHA agree in writing to cover any costs in excess of the HUD-estimated construction costs; demonstrate that it has the financial resources to meet the excess costs up to a specified amount; and provide some form of security acceptable to HUD to cover excess costs. For this purpose, an IHA may use attachable assets



including funds maintained in its reserve for replacements received from the sale of Mutual Help units.

(b) *Public advertisement.* Contracts for development of a project shall be awarded only after public advertisement and issuance of RFPs or IFBs. The advertisement shall inform all prospective offerors of any applicable HUD preference requirements for Indian contractors and of any Tribally developed preference requirements that are not inconsistent with HUD regulations. IHAs may choose to list all specific HUD Indian preference regulations in the solicitation.

#### § 905.220 Application procedures.

(a) *Submission to HUD.* An IHA that is not declared ineligible for funding in accordance with § 905.135 may submit an application for a project after HUD issues a general notification that funds are available. The application shall be on the form prescribed by HUD and shall be accompanied by all the legal and administrative attachments required by the form. The application must include comments by the Chief Executive Officer on behalf of the unit of local government where the project is to be located. Where the provisions for the necessary local government cooperation are not contained in the ordinance or other enactment creating the IHA, the IHA shall submit an executed cooperation agreement (or a copy of an existing one) for the location involved, which is sufficient to cover the number of units in the application. For an IHA that administers the Indian housing program for more than one specific Tribal government, or in the case of Alaska, more than one village, the IHA may submit an application on behalf of each distinct Tribal entity or village. An IHA administering the program in this manner is an "umbrella" IHA.

(b) *Action on application.* (1) HUD will acknowledge receipt of the application and begin review of the application within 14 calendar days after the application deadline.

(i) In order to submit an application, the IHA must be eligible and have satisfied any requirements imposed in accordance with § 905.135. If an ineligible IHA submits an application, the HUD Field Office will return the application, without review, within 14 calendar days of receipt. HUD will outline the specific reasons for the determination of ineligibility.

(ii) The application must be complete and must demonstrate legal sufficiency. If it is evident that any application fails to satisfy these requirements, the HUD field office will immediately return the application and will identify in writing

the deficiencies and permit the IHA an opportunity to make corrections within a reasonable period of time. This period may not be used to submit information which will alter the competitive position of the application. If an application satisfies these prerequisites, HUD will review the application and determine its ranking in comparison to other applications.

(2) Applications will be ranked separately for each program type. An IHA that has not previously been funded will be given a preference over all previously funded IHAs. The rankings will be based on awarding points to each application for the following categories:

(i) The relative unmet need for housing;

(ii) The relative IHA occupancy rate compared to the occupancy rates of other eligible IHA applications;

(iii) Length of time since the last Program Reservation date;

(iv) Current IHA development pipeline activity; and

(v) Other factors identified in a notice of funding availability.

(3) The ranking process will produce an ordered list of IHAs that may receive funding. The order will be established by the total number of points the application received in the rating process. After applications for all program types are listed together, the application with the highest point total will be funded first; the next highest will be funded second; and the process will continue until funds are exhausted.

(4) HUD will notify, in writing, each IHA that submitted an application whether its application was selected for funding.

(i) If HUD awards funding to an IHA for the requested number of units or for fewer units, HUD will proceed with a program reservation.

(ii) If HUD awards funding to the IHA for fewer units than the number requested, HUD will provide a written justification for the reduction.

(iii) If the IHA's application is not selected for funding, HUD will include in the notice a description of the method used in making the funding selections and any specific information as to how the IHA was rated on individual criteria in relation to other IHAs.

(5) The HUD field office will maintain specific written documentation outlining the criteria used in making all funding decisions. All relevant documentation will be made available to IHAs upon request.

(6) An IHA that believes that HUD has made a technical error in the calculation of their rating may request a review by the HUD Field Office. If the

HUD Field Office finds, upon re-ranking the applications, that the error prevented the IHA from being funded, it shall give priority consideration to that IHA in the next funding cycle for which the IHA is eligible to receive units.

(c) *Program reservation.* (1) The program reservation will specify program type, housing type, household type, development method, the funds reserved, and the minimum number of total units and units of each bedroom size to be developed. The program reservation will require an IHA to submit a development program within a specified time (see § 905.225) and will limit the total project development cost to the TDC level.

(2) As long as the total project development cost is not exceeded, this minimum number of units may be increased. However, no additional units may be developed until HUD approves an amendment to the program reservation. If an IHA desires to develop more than the minimum number of units approved in the program reservation, it must submit to HUD a request to amend the program reservation, including a justification for the increase. Amendment funds may not be used to increase the project size.

(d) *Execution of ACC.* (1) Upon issuance of the program reservation, HUD and the IHA may execute an ACC to cover the costs of surveys and other HUD-approved planning activities with respect to the number of units covered by the program reservation. The amount of the ACC will not exceed 3 percent of the total development cost of the project, except as provided in paragraph (d)(2) of this section or to meet the planning requirements of paragraph (f) of this section.

(2) HUD may execute an ACC for amounts in excess of 3 percent if the IHA demonstrates to the satisfaction of the HUD field office that (i) because of unusual circumstances it is essential that development costs in such amounts or for such purposes be incurred before execution of an ACC for construction and operation; and (ii) the project will successfully proceed to execution of an ACC for construction and operation.

(3) Funds for planning shall in no event be provided or used for purposes, or in amounts, that would not be approvable for inclusion in a development cost budget.

(4) The IHA shall submit for HUD approval together with the request for an ACC for planning a proposed preliminary budget. ACC funds for planning shall not be approved or expended except in accordance with a HUD-approved preliminary budget.



(5) Use of development or operating funds of other projects under ACC to cover costs for a project that is still in the planning stages, and for which a development program has not been adopted or an ACC for construction and operation has not been executed, is strictly prohibited.

(e) *ACC amendment for construction and operation.* An amendment to the ACC to cover development and operation of a project shall not be executed until the sites have received final HUD approval (except for acquisition) and the IHA has adopted, and HUD has approved, the development program for the project. In no event may an IHA execute a contract for construction or development before the execution of an ACC amendment for construction or development.

(f) *Comprehensive housing plan.* An IHA may use up to an additional one percent of the program reservation above the amount approved in accordance with paragraph (d) of this section to establish and/or update a master housing plan for its area of operation. The plan should contain such elements as proposed housing cluster sites, existing and proposed off-site roads, existing and proposed water and sewer facilities. In addition, the plan should address geographical and topographical features, as well as socio-economic factors such as employment opportunities, schools and services which have an impact on the placement of residential housing. The plan should be approved by resolution of the Tribal council.

(Information collection requirements contained in paragraph (a) of this section were approved by the Office of Management and Budget under OMB control number 2577-0030)

#### **§ 905.225 IHA development program.**

An IHA development program is required for all development methods, and must be approved by HUD.

(a) *IHA submission.* (1) At the project coordination meeting, the IHA and HUD shall establish a target date for submission of the complete development program. The IHA's failure to submit the complete development program by the date established may result in issuance of a notice of deficiency by the HUD Field Office requiring that the IHA establish a management improvement plan, in accordance with § 905.135.

(2) The IHA must commence construction within 30 months from the program reservation date. An IHA's failure to commence construction within 30 months constitutes grounds for termination of the project. Excluded from this computation is delay in

construction caused by the failure of HUD to process such project within a reasonable period of time, any environmental review requirement, or any judicial or administrative action affecting the project.

(b) *HUD review.* HUD will review the IHA development program upon receipt. HUD will advise the IHA of any deficiencies and will provide the IHA an opportunity to make corrections within 30 days of receipt of the notice of deficiencies. To be approvable, the development program must demonstrate legal sufficiency, the financial feasibility of the project, and its compliance with all program requirements. Upon conclusion of HUD's review, the development program will be either approved or disapproved. If the development program is approved, the ACC will be executed or amended, as necessary, and the IHA will be authorized to acquire the units or prepare final plans for construction. If the development program is disapproved, HUD will notify the IHA of the reasons.

(c) *Citizen participation.* The IHA shall hold at least one public meeting at which comments are solicited on both the proposed sites and project design from potential occupants, as well as from other persons interested in the project. Such meetings may be held in conjunction with regularly scheduled board meetings or may be held separately. Advertisement of the meetings shall begin at least two weeks before they are held. The IHA should give maximum consideration to all public comments in the design of the project. Minutes from the meetings shall be included in the submission of the development program to HUD. Failure to hold these public meetings or to include the minutes of these meetings in the development program shall be grounds for disapproval of the development program.

#### **§ 905.230 Site selection criteria.**

(a) *Relation to Tribal, local and regional plans.* Selected sites must comply with all applicable Tribal, local and/or regional plans.

(b) *Access roads.* Access roads up to the boundaries of multi-unit sites shall be provided by the BIA, the Tribe or other appropriate agency and shall not be an eligible cost of the project. Access roads up to the boundaries of individual homesites in a scattered site project shall be provided by the homebuyer, the Tribe, or other appropriate agency and shall not be an eligible cost of the project. Access roads shall be maintained by a responsible local entity to provide safe and suitable vehicular

access at all times. No site may be approved unless such access roads exist, or a written assurance has been obtained from the responsible entity that roads will be constructed before commencement of project construction.

(c) *Utilities.* (1) Before final site approval, the IHA shall obtain a written assurance from the IHS (or the appropriate local agency) that adequate water and sanitation facilities exist or will be provided in time for occupancy of the housing.

(2) Before final site approval, the IHA shall obtain a written assurance from the appropriate utility companies (or other responsible entities) providing electricity and heating and cooking fuels that the sources exist or will be provided in time for occupancy of the housing.

(3) Before final site approval, the IHA must demonstrate that all utility services necessary for the operation of the project are available and that no legal, political, geographical, or contractual obstacles exist that will prevent access to these utility services.

(d) *Physical characteristics of site.* The physical characteristics of a site shall facilitate overall economy in site preparation, construction, and management. Only reasonable costs will be approved for surveys, planning, test borings, and test wells.

(e) *Topography.* (1) Sites with dominant grades in excess of fifteen degrees shall not be used unless no other approvable sites are available, in which case a written justification shall be provided.

(2) Low-lying sites shall not be approved unless practical and economical means of surface drainage can be provided to accommodate the level of rainfall expected.

(3) The topography shall permit the acceptable placement of the proposed number and type of units.

(f) *Subsurface conditions and natural hazards.* (1) Where there is any evidence to suggest that a site may have unsuitable bearing qualities or excessive areas of rock to be excavated, final site approval will not be given until an examination of the adverse conditions has indicated that they can be overcome without unreasonable additional costs to the project.

(2) Final site approval will not be given if the hazard of earthslides exists either on the site or on adjacent land.

(3) The IHA shall take appropriate precautions in the design of the project in areas where local experience shows past loss of life or damage resulting from earthquakes, hurricanes, tornadoes, or other natural disasters.



(4) The IHA shall undertake subsurface soil investigations, if required, as soon as tentative site approval is given.

(5) Final site approval will not be given if it has been determined that there is an unreasonable risk of natural hazard, unless such risk can be mitigated through design and construction.

(g) *Flooding.* Final site approval will not be given for a site located in a special flood hazard area identified by the Federal Emergency Management Agency or a wetland designated by the Department of Interior or the U.S. Army Corps of Engineers until it has received special processing by HUD and been found to be in compliance with Executive Orders 11988 (Floodplain Management) and/or 11990 (Protection of Wetlands) in accordance with § 905.120(a). See also the requirement for flood insurance coverage found in § 905.120(b).

(h) *Multi-unit and scattered sites.* A project may consist of a multiunit site (including individual homes on contiguous lots), or scattered sites, or a combination.

(i) *Size of sites.* An individual homesite, whether a scattered site or included in a multi-unit site, shall not exceed one acre—or with respect to trust or restricted land, the size determined by Tribal or local policy without HUD approval. The amount to be included in the development cost for each site shall not exceed its prorated share of the total site acquisition cost, based on its actual size.

(j) *Trust or restricted land.* Final site approval of a site on trust or restricted land over which the BIA has authority will not be given unless the IHA obtains written assurance from the BIA that a valid lease executed by all the necessary parties can be obtained within a reasonable time and before start of construction. In any event, construction may not begin on a site until a valid lease is executed.

#### § 905.235 Types of interest in land.

(a) *Trust or restricted land.* Sites on tribally or individually owned trust or restricted land (as defined in 25 CFR 151.2) shall be leased to the IHA for a term of not less than 50 years (25 years, automatically renewable for an additional term of 25 years) on a lease form approved by HUD, which will provide that the lease cannot be terminated before its expiration without the consent of the IHA. For sites on trust or restricted land, HUD may accept a title status report furnished by the BIA.

(b) *Unrestricted land.* Sites on unrestricted land shall be either

conveyed to the IHA in fee or leased to the IHA on a lease form approved by HUD for a term of not less than 50 years.

#### § 905.240 Appraisals.

(a) *Requirement for appraisals.* When the cost of a site is to be charged to the IHA's development cost, an appraisal shall be made in accordance with the standards specified in this section. The cost of donated trust land may be assumed to be \$1,500, in which case, no appraisal is required. An appraisal of trust land must be performed if the IHA determines that the value to be attributed to the site exceeds \$1,500.

(b) *Performance of appraisals.* The IHA shall submit a formal request for appraisal to HUD or BIA, as appropriate. When BIA appraisal service is available, appraisals shall be provided by the BIA (unless HUD agrees to provide the service), and shall be accepted by HUD. Where BIA appraisal services are not available, an appraisal of any land may be provided by the IHA in accordance with paragraph (c) of this section and approved by HUD or may be performed by HUD.

(c) *Conformity with appraisal standards.* All appraisals shall be in conformance with established and generally recognized appraisal practice and procedures in common use by professional appraisers. Opinions of value shall be based on the best available data, properly analyzed and interpreted.

(1) *Nature of legal interest in land.* In valuing the property interest to be conveyed to the IHA, appraisals shall give full consideration to the nature of the property interest, including any legal and market restrictions and restraints on alienation that affect market value. It shall be determined whether the interest to be conveyed to the IHA is fee simple title, an easement, a leasehold or another property right. In the case of Tribally or individually owned trust or restricted land to be leased to the IHA, the appraiser shall report the value of the leasehold.

(2) *Market data comparables.* In the application of the market data approach to valuation, property shall be compared with properties that have been leased or sold recently in the same or competing market areas.

(3) *Valuation of trust or restricted land.* When the interest to be appraised is a leasehold interest in Tribally or individually owned trust or restricted land and comparable leasehold transactions are not available, the appraiser shall estimate the value of the land as if alienable in fee, based on a comparison of the land being valued with sales of fee interests in comparable

land in the same or competing market areas.

(Approved by the Office of Management and Budget under OMB control number 2577-0031)

#### § 905.245 Site approval.

(a) *IHA certification.* Unless HUD has determined that an IHA is "high risk" or a notice of deficiency for this function has been issued, the IHA may submit a written certification that the actions necessary to satisfy the conditions of tentative and final site approval, as described in this section, have been completed and the site is acceptable. HUD will monitor IHA performance of this function and may place limitations on this authority to certify compliance or may require additional training of IHA staff as a condition of continued authorization.

(b) *IHA request for approval.* If an IHA has been determined to be "high risk" or a notice of deficiency for this function has been issued, it shall request approval for each site by submitting the prescribed form to HUD generally before, but no later than simultaneously with, the development program, discussed in § 905.265. The IHA request shall include all exhibits required by the form, including the written approval of the BIA and IHS where needed.

(c) *Tentative site approval.* (1) Tentative site approval will not be given until the requirements for compliance with local governmental approval have been met. See 24 CFR part 791.

(2) If the site has not been proposed previously, each site must be inspected to assure that it meets the site selection criteria in § 905.240 and assess its environmental impact. HUD shall notify the IHA as soon as possible of tentative approval or disapproval of the proposed site. If tentative approval is given, the notification shall state any conditions to be met for final site approval. HUD shall state the reasons for disapproval of any site.

(d) *Final site approval.* (1) Final site approval will be given when a site satisfies all of the conditions stated in the tentative approval and, with respect to trust land, the BIA has given either unconditional concurrence for final site approval or concurrence conditioned only on subsequent execution of site leases or right-of-way easements.

(2) Final site approval on all sites for the project must be given (i) before HUD executes an ACC for construction and operation, except for a project developed under the acquisition method or for restricted land sites, in accordance with paragraph (d)(3); (ii) before any commitment is made to



acquire or lease any site; and (iii) before construction is started. In addition, leases and necessary rights-of-way must be obtained before HUD will authorize solicitation of construction bids or before construction may begin on any units.

(3) With respect to trust or restricted land sites, HUD may execute the ACC for construction and operation before final site approval of all sites only when the following conditions have been met:

(i) All sites for the project have tentative site approval;

(ii) At least 50 percent of the sites have final site approval;

(iii) HUD is satisfied that the balance of the sites will meet the requirements for final site approval no later than one year from execution of the construction contract; and

(iv) The construction contract provides that if all sites, finally approved and with executed leases, have not been delivered by the IHA to the contractor within one year from execution of the construction contract (or HUD-approved extension), the construction contract shall be reduced by the amount attributable to the units to be developed on the undelivered sites.

(Information collections contained in paragraph (b) of this section were approved by the Office of Management and Budget under OMB control number 2577-0031)

#### **§ 905.250 Design criteria.**

(a) *Applicable building code*—(1) *General.* For purposes of housing assisted under this chapter IX, the IHA must use the applicable Tribal or other local building code where it meets or exceeds standards of model national building codes; or if there is none, it must use a model building code, or a State or other locality's building code. The IHA must coordinate with the Tribe, or local government, if appropriate, to assure adoption of a code that satisfies the standards specified in paragraph (a) (2) of this section. The code may make special provisions for traditional and culturally oriented design features.

(2) *Required standards.* The code used must provide sufficient flexibility to permit the use of different designs and materials; must include cost-effective energy conservation performance standards designed to ensure the lowest total construction and operating costs; must give proper consideration to the needs of physically handicapped persons for ready access to, and use of, housing assisted under this chapter (see 24 CFR part 8); and must be sufficient to produce a decent, safe and sanitary home.

(b) *Fuel and energy consumption.* In selecting from among design options for heating, cooking, and electrical systems, maximum attention shall be given to cost, adequacy, maintenance of the system, and the longterm reliability of fuel supplies. Where fuel is not locally available at low cost, alternate systems such as wind, solar, or coal, may be used and included in the project cost.

(c) *HUD approval.* The design chosen by the IHA will not be disapproved by HUD without justification. The justification shall consist of a showing by HUD that the design does not meet the applicable building standard, the project cannot be constructed within the amount of funds reserved for the development, or that the project is not financially feasible because of unacceptably high maintenance costs.

#### **§ 905.255 Total development cost standard.**

(a) *Total development cost standard.* The total development cost (TDC) standard, which limits the allowable cost for developing Indian housing projects, is determined as a per unit cost for various unit sizes, structure types and geographic areas. It is developed by HUD by applying a simple multiplier to an average construction cost.

(1) HUD makes the determination of the TDC standard on a regular basis, by averaging the current construction costs by geographic area, as listed by at least two nationally recognized residential construction cost indices, for publicly bid construction of a good and sound quality. The average construction cost is then multiplied by a simple multiplier, prescribed for elevator structures or for non-elevator structures.

(2) The costs covered by the TDC approved for a project, which is subject to the TDC standard, include all costs associated with the project, except for costs of off-site water and sanitation facilities infrastructure. The TDC limit for a project shall be calculated by multiplying the number of units for each bedroom size and structure type in the project by the applicable per unit TDC standard, and adding together the amounts for all the units in the project.

(b) *Applicability.* Any program reservation, ACC, or ACC amendment for the development, acquisition, or operation of Indian housing executed on or after November 9, 1989 shall be subject to this TDC limit.

(c) *Creation of new TDC areas.* HUD field offices shall periodically assess the adequacy of the existing TDC areas. The geographical area used as a TDC area shall be a single contiguous physical area with a clearly identified boundary line. TDC areas shall have a relatively

consistent construction bidding environment, and they shall not overlap. The HUD Regional Administrator may request the Indian field office to prepare a recommendation for changing the TDC areas.

(d) *Approval of total development cost for a project.* (1) The total development cost, as defined in § 905.102, is the amount approved by HUD for development of a particular project, and it will not exceed the TDC limit except as follows:

(i) The Secretary may provide that the TDC for a project may exceed the TDC limit by up to 10 percent of the published TDC for special situations such as, but not limited to, required relocation costs, start-up costs for on-site solid waste removal, and energy efficient housing design.

(ii) In unusual circumstances, where the Secretary makes a written determination that there is good cause to exceed the limit of 110 percent of the maximum allowable TDC, the Secretary may approve a higher amount. Examples of circumstances that might form the basis for this type of determination are unforeseen site improvement costs that are on-site only (not including any cost related to roads or driveways), and donations.

(iii) Any approval to exceed the TDC limit for a development that is based on the published TDC standard shall be subject to fund availability.

(2) In approving the total development cost, HUD will approve a reasonable amount for preliminary planning, but the amount may not exceed 3 percent of the TDC, except as provided in § 905.220(d).

(e) *Program reservations.* (1) Funds reserved for initial program reservations shall be based on reasonable costs for developments, up to the maximum allowable TDC, and shall not be reserved automatically at the maximum. The initial program reservation amount shall be the lower of the TDC limit (maximum allowable) based on the published TDC standards, or a development cost estimate based on a hypothetical budget, using the construction cost data and the most appropriate estimates of non-construction line items taken from data of actually constructed HUD-assisted Indian housing. The hypothetical budget shall reflect the Department's concerns to promote economy while ensuring that Indian housing will be decent, safe, sanitary, durable, cost effective and energy efficient.

(2) After initial funding, the IHA may propose any reasonable housing design in their development program, as long as the code standards adopted by the IHA



are not compromised and the cost of the units to HUD will not exceed the funds reserved.

(f) *Cost review.* HUD will review the development budget of each project for compliance with the maximum allowable TDC based on published TDC standards and with reasonable development costs, determined by a cost estimate prepared using HUD data on Indian housing developments actually constructed. The review will consider any conditions that may affect the cost analysis, such as logistical problems associated with developments of remote location, low density or scattered sites, the unavailability of skilled labor and acceptable materials, local customs, abnormal climatic conditions, and alternative heat sources, such as wood or coal.

(g) *Construction at reasonable cost.* The IHA shall complete development of each project at the lowest possible cost of construction and long-term operation of the project, and in no event may the cost of the project exceed the approved total development cost.

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(h) *Training of tenants.* The Development Cost Budget submitted with the development program for a Rental project shall include an estimated amount for costs of a HUD-approved tenant counseling program not to exceed \$500 per dwelling unit (including follow-up needs during the management stage and counseling in connection with turnover.) This counseling shall be subject to the provisions of § 905.454 (substituting renter and prospective renter for Homebuyer) except for those provisions which by their nature are only applicable to projects and except for references to the BIA training program.

(i) *Initial Insurance Premiums.* The insurance premiums for the first three years may be included in development costs, with no obligation for reimbursement from operating receipts.

#### § 905.260 Construction and inspections.

Following approval of the development program, the IHA shall commence final planning and begin construction within one year. Unless there are circumstances beyond the IHA's control, as defined in § 905.225, failure to commence construction within 30 months from the time of program reservation constitutes cause for HUD termination of the ACC and recapture of the reserved funds.

(a) *Conventional projects.* Unless HUD has made a negative finding with respect to development functions, as

described in § 905.212, the IHA may prepare the plans, advertise, and award a construction contract without prior HUD approval and certify compliance with HUD procedures in that process. The IHA must submit copies of the plans, advertisements and construction contract with the certification to HUD.

(b) *Turnkey and modified turnkey projects.* Unless HUD has made a negative finding with respect to development functions, as described in § 905.212, the IHA may execute the contract of sale without prior HUD approval and certify in writing proper preparation of the plans and execution of the contract of sale. The IHA shall submit copies of the plans and Contract of Sale with the certification to HUD.

(c) *Force account.* Unless HUD has made a negative finding with respect to development functions, as described in § 905.212, the IHA may prepare the final working drawings, showing the scope of work to be performed by the IHA staff or by subcontractors, and the solicitation for work and begin work without prior HUD approval. The IHA will then certify proper preparation of the drawings and solicitation of work and will submit copies of the drawings.

(d) *IHA construction inspections.* Whatever the development method used, the IHA shall be responsible for obtaining independent inspections throughout the construction period. The frequency of inspections and the procedures to be used shall assure completion of quality housing in accordance with the contract documents. Inspections shall be performed by an independent architect, engineer, or other qualified person selected by the IHA and approved by HUD.

(e) *HUD construction monitoring.* HUD representatives or agents shall visit construction sites to evaluate the IHA's contract administration. These visits should not be construed by the IHA as construction inspections.

(f) *Completion inspection.* (1) The contractor shall notify the IHA in writing when the contract work (or stage) is completed and ready for final inspection. If the IHA agrees that the contract work (or stage) is ready for final inspection, the IHA shall arrange for the inspection. The final inspection shall be made jointly by the IHA and the contractor. The IHA must notify the HUD field office before this inspection, and HUD may require that HUD staff be present, based on its review of the IHA's performance on the development. In a MH project, homebuyers shall also be invited to participate in the inspection of their homes, but acceptance shall be by the IHA with HUD approval. Maximum

consideration shall be given to all homebuyer concerns. When the BIA has maintenance responsibility for any part of the project after completion, it too shall be invited to participate.

(2) If the inspection discloses no deficiencies other than punch list items or seasonal completion items, the IHA may develop an interim Certificate of Completion for submission to HUD. The interim Certificate will detail the items remaining and set forth a schedule for their completion, and will allow the IHA to accept the units (or stage) for occupancy. Upon HUD approval of the interim Certificate, the IHA may release the monies due the contractor less withholdings in accordance with the construction contract.

(3) The contractor shall complete the punch list items in accordance with the time schedule contained in the interim Certificate of Completion. Unless specifically authorized, HUD approval is required before the IHA may pay the contractor for such items. The IHA shall not accept an item if there is a dispute as to whether the item has been completed. If the IHA is satisfied that the applicable requirements of the construction contract and the interim Certificate have been met, the IHA shall prepare a final Certificate of Completion. Unless HUD has made a negative finding with respect to development functions in accordance with § 905.212, the IHA will submit the final certificate and certify in writing that the items have been completed, and release the amounts withheld to the contractor.

(The information collection contained in paragraph (f)(3) was approved by the Office of Management and Budget under OMB control number 2577-0021.)

#### § 905.265 Warranty inspections and enforcement.

(a) The construction contract shall specify the warranty periods applicable to items completed as of the date of full availability (DOFA) determined by HUD, and to items completed after that date. It shall also provide for assignment to the IHA of manufacturers' and suppliers' warranties covering equipment or supplies.

(b) The IHA shall inspect each dwelling unit at least once during the contractor's warranty period, which begins three months after the memorandum of acceptance for occupancy is executed by the IHA and HUD (following an on-site inspection). This inspection shall occur not later than six months after the start of the warranty period. A final warranty inspection shall be made in time to



exercise the IHA's rights before expiration of the contractor's warranties. Each inspection shall cover all items under warranty at the time of the inspection, including items covered by manufacturers' and suppliers' warranties. At each inspection, the IHA shall obtain a signed statement from the occupants as to any deficiencies in the structure, equipment, grounds, etc., so that it may enforce any rights under applicable warranties.

#### § 905.270 Correcting deficiencies.

(a) *Responsibility.* The IHA must pursue correction of any deficiencies against the responsible party (e.g. architect, contractor or the MH homebuyer) as soon as possible after discovering the deficiencies. Where the costs of correcting deficiencies cannot be recovered from the responsible party and/or the deficiency requires immediate correction to protect life or safety or to avoid further damage to the project unit(s), the IHA may apply to HUD for amendment of the development budget to provide the funds required, or may request that operating receipts be authorized to be used to cover the costs. In any case, program funds shall not be used for this purpose without prior HUD approval. The IHA shall be responsible for correction of any deficiencies which could have been detected and/or corrected during the warranty period if the IHA had inspected at the appropriate time or had pursued correction of deficiencies against the responsible parties.

(b) *Amendments.* (1) The ACC may be amended to provide amounts needed to correct deficiencies (and any damage resulting therefrom) in design, construction, and equipment only where there is substantial evidence that it is not possible to obtain timely correction or payment by the responsible parties, including the source of the performance bond.

(2) In the case of a MH home, the additional cost for correcting deficiencies in design, construction or equipment (and any damage resulting therefrom) shall not result in an increase in the homebuyer's purchase price. If a homebuyer is not in compliance with the MHO Agreement, HUD shall require the IHA to reach agreement with the homebuyer to correct the noncompliance before approving the work.

#### § 905.275 Fiscal closeout.

The IHA shall submit the actual development cost certificate within 24 months of the date of full availability, in a form prescribed by HUD, to the HUD office for review, audit verification and

approval. The audit shall follow the requirements of 24 CFR part 44 (Single Audit Act of 1984). If the audited development cost indicates that excess funds have been approved, the IHA shall dispose of the excess as HUD directs. If the audited development cost certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD directs.

(Approved by the Office of Management and Budget under OMB control number 2577-0033.)

### Subpart D—Operation

#### § 905.301 Admission policies.

(a) *Admission policies.* (1) The IHA shall establish and adopt written policies for admission of participants. The policies shall cover all programs operated by the housing authority and, as applicable, will address the programs individually to meet their specific requirements (*i.e.*, Rental, MH, or Turnkey III). A copy of the policies shall be posted prominently in the IHA's office for examination by prospective participants, and shall be submitted to the HUD field office promptly after adoption by the IHA. (See § 905.416 with respect to Mutual Help admission policies.)

(2) The policies shall be designed:

(i) To avoid concentrations of the most economically and socially deprived families in any one or all of the IHA's projects;

(ii) To attain at initial occupancy, or within a reasonable period of time thereafter (but without prejudice to contract rights of homebuyers), a participant mix in each project composed of families with a broad range of incomes which generally reflects the range of incomes of those low-income families in the Indian area who would be qualified for admission to the type of project;

(iii) To preclude admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the participants or the project environment; and

(iv) To give a preference in the selection of participants (in accordance with § 905.305) who at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

(3) The IHA admission policies shall include the following:

(i) Requirements for applications and waiting lists, including requirement for selection from the top of the list;

(ii) Procedures governing participant transfer between units, projects, and programs;

(iii) Other IHA priorities, if any, and a requirement that a participant is not eligible for voluntary transfer unless all obligations under the current program have been met, including payment of charges to the IHA and completion of maintenance requirements;

(iv) Compliance with 24 CFR part 750, which requires applicants and participants to disclose and verify social security numbers at the time eligibility is determined and at later income reexaminations;

(v) Compliance with 24 CFR part 760, which requires applicants and participants to sign and submit consent forms for the obtaining of wage and claims information from State wage and information collection agencies; and

(vi) Procedures for determining the successor to a unit upon the death of a homebuyer (in the event that the homebuyer has not designated a successor or the successor fails to qualify).

(b) *Income limits.* (1) A family must be a Low-income family, as defined in § 905.102, to be eligible for admission. (With respect to eligibility for the Mutual Help program, see special provisions of § 905.416.)

(2) In extremely unusual circumstances, the IHA may request that HUD increase or decrease income limits for low-income families or for very low-income families in the Indian area because of unusually high or low family incomes. Such a request can be granted only by joint approval of HUD's Assistant Secretary for Housing and Assistant Secretary for Public and Indian Housing, with the concurrence of the Secretary of Agriculture.

(c) *Standards for IHA tenant/homebuyer selection criteria.* (1) The criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant, and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member. The IHA's tenant/homebuyer selection criteria must be in accordance with HUD guidelines and submitted to the HUD Field Office. (With respect to the Mutual Help program, see special provisions of § 905.416.)

(2) In the event of any unfavorable information regarding an applicant, the IHA must take into consideration the time, nature, and extent of the past occurrence and reasonable probability of future favorable performance.



(d) *Single person occupancy limitations under section 3(b)(3) of the Act.* No IHA shall admit single persons, as defined in § 905.102, to any Indian housing unit except with authorization from the HUD field office director in accordance with this section.

(1) The HUD field office director may authorize any IHA to permit single persons to occupy any project if:

(i) The project is one that has been or is intended to be converted to a low-income project assisted under the Act, and (A) single persons are residing in the project at the time of conversion, or (B) the field office director determines that the project is not suitable for occupancy by the elderly, disabled, or handicapped because of design or location; or

(ii) The project is a low-income project receiving assistance under the Act and is experiencing sustained vacancies as evidenced by one or more units having been vacant for a period of sixty days or more and no eligible applicants other than single persons are available.

(2) Any IHA may initiate an application for authorization to permit single persons to occupy a project. In addition, the HUD field office director may request the IHA to submit such an application. The application shall be submitted to the appropriate HUD field office in the form of a letter, which shall include the following:

(i) Identification of the project or projects involved and the maximum number of units for which the authorization is requested.

(ii) A copy of the tenant selection policy that shall govern occupancy by single persons.

(iii) A narrative justification for the request including, in cases where the request is based on vacancies in a project already receiving assistance, a description of the IHA's efforts to attract eligible applicants other than single persons to the project or projects involved.

(3) The HUD field office shall notify the IHA in writing of the action taken with respect to the application, which may be one of the following:

(i) Approval as requested.

(ii) Approval for a lesser number of units or projects than requested and any other conditions or modifications.

(iii) Disapproval, with a statement of the reasons.

(4) Notwithstanding any authorization to permit occupancy by single persons, an IHA shall extend preference to elderly families (including disabled persons and handicapped persons) and displaced persons over single persons unless the field office director has

determined that the project or portion of the project is not suitable for occupancy by the elderly, disabled, or handicapped.

(e) *Selection preference with respect to projects for elderly families.* (1) In determining priority for admission to projects for elderly families, an IHA must give a preference to elderly families. When selecting applicants for admission from among elderly families, an IHA must follow its policies and procedures for applying the Federal preferences contained in § 905.305.

(2) An IHA may give a preference to near elderly families in determining priority for admission to projects for elderly families when the IHA determines that there are not enough eligible elderly families to fill all the units that are currently vacant or expected to become vacant in the next Fig. 2 months. In no event may an IHA admit a near elderly family if there are eligible elderly families on the IHA's waiting list that would be willing to accept an offer for a suitable vacant unit in that project.

(3) Before electing the discretionary preference in paragraph (e)(2) of this section, an IHA must conduct outreach to attract eligible elderly families, including, where appropriate, elderly families residing in projects not designated as being for elderly families.

(4) If an IHA elects the discretionary preference in paragraph (e)(2) of this section, the IHA must follow its policies and procedures for applying the Federal preferences contained in § 905.305 when selecting applicants for admission from among near elderly families. Near elderly families that do not qualify for a Federal preference and that are given preference for admission under this section over other non-elderly families that qualify for such a Federal preference are not subject to the 10 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 905.305(b)(2)(ii). If a near elderly applicant is a single person, the near elderly single person may be given a preference for admission over other single persons to projects for the elderly. Notwithstanding any preference over other single persons, a near elderly single person's selection for admission is subject to the single person occupancy limitation restriction contained in paragraph (d) of this section.

(f) *Verification of information and notification to applicants—(1) Verification.* Adequate procedures shall be developed to obtain and verify information with respect to each applicant. Information relative to the

acceptance or rejection of an applicant shall be documented and placed in the applicant's file.

(2) *Notification to applicants.* (i) If an applicant is determined to be ineligible for admission to a project, the IHA shall promptly notify the applicant of the basis for such determination and shall provide the applicant, upon request and within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination; and

(ii) When a determination has been made that an applicant is eligible and satisfies all requirements for admission including the tenant selection criteria, the applicant shall be notified of the approximate date of occupancy insofar as that date can be reasonably determined.

(Approved by the Office of Management and Budget under OMB control number 2577-0063.)

#### § 905.305 Federal selection preferences.

(a) *General.* (1) In selecting applicants for admission to its projects, each IHA must give preference to applicants who are otherwise eligible for assistance and who, at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

(2)(i) The IHA must inform all applicants of the availability of the Federal preferences, and must give all applicants an opportunity to show that they qualify for a preference. For purposes of this paragraph (a)(2)(i), applicants include families on any waiting list maintained by the IHA when this section is implemented or thereafter.

(ii) If the IHA determines that the notification to all applicants on a waiting list required by paragraph (a)(2)(i) of this section is impracticable because of the length of the list, the IHA may provide this notification to fewer than all applicants on the list at any given time. The IHA must, however, have notified a sufficient number of applicants at any given time that, on the basis of the IHA's determination of the number of applicants on the waiting list who already claim a Federal preference, and the anticipated number of project admissions:

(A) There is an adequate pool of applicants who are likely to qualify for a Federal preference; and

(B) It is unlikely that, on the basis of the IHA's framework for applying the preferences under paragraph (b) and the preferences claimed by those already on the waiting list, any applicant who has



not been so notified would receive assistance before those who have received notification.

(3) An IHA must apply the definitions of "standard, permanent replacement housing"; "involuntary displacement"; "substandard housing" and "homeless family"; "family income"; and "rent" set forth in paragraphs (c)(5), (d), (f), (h), and (i), respectively, of this section, unless the IHA submits alternative definitions for HUD's review and approval. An IHA may apply the verification procedures found in paragraphs (e), (g), and (j) of this section, or it may, in its own discretion and without HUD approval, adopt verification procedures of its own.

(4) For purposes of this section, the term "Federal preference" means a tenant selection preference provided under this section. The term "preference" means a Federal preference, unless the context indicates otherwise.

*(b) Applying the Federal preferences.*

(1) Each IHA must include the Federal preferences in its tenant selection policies and procedures. The IHA must apply the Federal preferences in a manner that is consistent with the provisions of this section, and other applicable requirements.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the IHA must establish a system for applying the Federal preferences that provides that an applicant who qualifies for any of the Federal preferences is to be admitted before any other applicant who is not so qualified without regard to the other applicant's qualification for one or more preferences or priorities that are not provided by Federal law, place on the waiting list, or the time of submission of an application for admission.

(ii) The IHA's system for applying the Federal preferences may provide for circumstances in which applicants who do not qualify for a Federal preference are admitted before other applicants who are so qualified. Not more than 10 percent of the applicants who initially are admitted in any one-year period (or such shorter period selected by the IHA before the beginning of its first full year under this paragraph (b)(2)(ii)) may be applicants referred to in the preceding sentence.

(iii) In applying the preferences under this paragraph (b)(2), the IHA may determine the relative weight to be accorded the Federal preferences, through means such as:

(A) Applying non-Federal preferences or priorities (such as local residency preferences) as a way of ranking applicants who qualify (or claim qualification) for a Federal preference;

(B) Aggregating the Federal preferences (*i.e.*, two Federal preferences outweigh one and three outweigh two);

(C) Ranking the Federal preferences (*e.g.*, provide that an applicant living in substandard housing has greater need for housing than (and, therefore, would be considered for admission before) an applicant paying more than 50 percent of income for rent); or

(D) Ranking the Federal preferences definitional elements (*e.g.*, provide that those living in housing that is dilapidated or has been declared unfit for habitation by an agency or unit of government have a greater need for housing than, and take precedence over, those whose housing is substandard only because it does not have a usable bathtub or shower inside the unit for the exclusive use of the family).

(3) To the extent that title VI of the Civil Rights Act of 1964 and the Fair Housing Act (42 U.S.C. 3601-3620) apply to a Tribal government, any selection preferences or priorities used by an IHA within such a Tribe's jurisdiction must be established and administered in a manner that is consistent with HUD's affirmative fair housing objectives and that is not incompatible with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d; the Fair Housing Act (42 U.S.C. 3601-3620); Executive Order 11063 on Equal Opportunity in Housing, 27 FR 11527 (1962), as amended, 46 FR 1253 (1980); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; the Age Discrimination Act of 1975, 42 U.S.C. 6101-07; or HUD's regulations and requirements issued under these authorities.

*(c) Qualifying for a Federal preference.* (1) An applicant qualifies for a Federal preference if—

(i) The applicant has been involuntarily displaced and is not living in standard, permanent replacement housing, or within no more than six months from the date of certification under paragraph (c)(2) of this section or verification under paragraph (c)(3) of this section (as appropriate), the applicant will be involuntarily displaced;

(ii) The applicant is living in substandard housing; or

(iii) The applicant is paying more than 50 percent of family income for rent.

(2) Applicants may claim qualification for a Federal preference when they apply for admission to a project (or thereafter until they are offered a unit in the project) by certifying to the IHA that they qualify for a preference under paragraph (c)(1) of this section by virtue of the applicant's current status. The applicant's current status must be

determined without regard to whether there has been a change in the applicant's qualification for a preference between the certification under paragraph (c)(2) of this section and admission to a project, including a change from one Federal preference category to another.

(3) Once an applicant's qualification for a Federal preference under paragraph (c)(1) of this section has been verified, an IHA need not require the applicant to verify such qualification again, unless, as determined by the IHA, such a long time has elapsed since verification as to make reverification desirable, or the IHA has reasonable grounds to believe that the applicant no longer qualifies for a Federal preference.

(4) For purposes of this paragraph (c), "standard, permanent replacement housing" is housing—

(i) (A) That is decent, safe, and sanitary;

(B) That is adequate for the family size; and

(C) That the family is occupying pursuant to a lease or occupancy agreement.

(ii) Such housing does not include transient facilities, such as motels, hotels, or temporary shelters for victims of domestic violence or homeless families, and in the case of domestic violence referred to in paragraph (d)(2) of this section, does not include the housing unit in which the applicant and the applicant's spouse or other member of the household who engages in such violence live.

(5) An applicant may not qualify for a Federal preference under paragraph (c)(1)(ii) of this section if the applicant is paying more than 50 percent of family income to rent a unit because the applicant's housing assistance under the United States Housing Act of 1937 or section 101 of the Housing and Urban Development Act of 1965 with respect to that unit has been terminated as a result of the applicant's refusal to comply with applicable program policies and procedures with respect to the occupancy of underoccupied and overcrowded units.

*(d) Definition of involuntary displacement.* (1) An applicant is or will be involuntarily displaced if the applicant has vacated or will have to vacate his or her housing unit as a result of one or more of the following actions:

(i) A disaster, such as a fire or flood, that results in the uninhabitability of an applicant's unit;

(ii) Activity carried on by an agency of the United States or by any State or local governmental body or agency in connection with code enforcement or a



public improvement or development program; or

(iii) Action by a housing owner that results in an applicant's having to vacate his or her unit, where:

(A) The reason for the owner's action is beyond an applicant's ability to control or prevent;

(B) The action occurs despite an applicant's having met all previously imposed conditions of occupancy; and

(C) The action taken is other than a rent increase.

(2) An applicant also is involuntarily displaced if—

(i)(A) The applicant has vacated his or her housing unit as a result of actual or threatened physical violence directed against the applicant or one or more members of the applicant's family by a spouse or other member of the applicant's household; or

(B) The applicant lives in a housing unit with such an individual who engages in such violence.

(ii) For purposes of this paragraph (d)(2), the actual or threatened violence must, as determined by the IHA in accordance with HUD's administrative instructions, have occurred recently or be of a continuing nature.

(3) For purposes of paragraph (d)(1)(iii) of this section, reasons for an applicant's having to vacate a housing unit include, but are not limited to, conversion of an applicant's housing unit to non-rental or non-residential use; closure of an applicant's housing unit for rehabilitation or for any other reason; notice to an applicant that he or she must vacate a unit because the owner wants the unit for the owner's personal or family use or occupancy; sale of a housing unit in which an applicant resides under an agreement that the unit must be vacant when possession is transferred; or any other legally authorized act that results or will result in the withdrawal by the owner of the unit or structure from the rental market. Such reasons do not include the vacating of a unit by a tenant as a result of actions taken because of the tenant's refusal (i) to comply with applicable program policies and procedures under this title with respect to the occupancy of underoccupied and overcrowded units or (ii) to accept a transfer to another housing unit in accordance with a court decree or in accordance with such policies and procedures under a HUD-approved desegregation plan.

(e) *Verification procedures for applicants involuntarily displaced.* Verification of an applicant's involuntary displacement is established by the certification, in a form prescribed by the Secretary:

(1) Made by a unit or agency of government that an applicant has been or will be displaced as a result of a disaster, as defined in paragraph (d)(1)(i) of this section;

(2) Made by a unit or agency of government that an applicant has been or will be displaced by government action, as defined in paragraph (d)(1)(ii) of this section;

(3) Made by an owner or owner's agent that an applicant had to, or will have to, vacate a unit by a date certain because of an owner action referred to in paragraph (d)(1)(iii) of this section; or

(4) Made by the local police department, social services agency, or court of competent jurisdiction, or a clergyman, physician, or public or private facility that provides shelter or counseling to the victims of domestic violence, that an applicant has been or is being displaced because of domestic violence, as described in paragraph (d)(2) of this section.

(f) *Definition of substandard housing.*

(1) A unit is substandard if it:

(i) Is dilapidated;

(ii) Does not have operable indoor plumbing;

(iii) Does not have a usable flush toilet inside the unit for the exclusive use of a family;

(iv) Does not have a usable bathtub or shower inside the unit for the exclusive use of a family;

(v) Does not have electricity, or has inadequate or unsafe electrical service;

(vi) Does not have a safe or adequate source of heat;

(vii) Should, but does not, have a kitchen; or

(viii) Has been declared unfit for habitation by an agency or unit of government.

(2) For purposes of paragraph (f)(1) of this section, a housing unit is dilapidated if it does not provide safe and adequate shelter, and in its present condition endangers the health, safety, or well-being of a family, or it has one or more critical defects, or a combination of intermediate defects in sufficient number or extent to require considerable repair or rebuilding. The defects may involve original construction, or they may result from continued neglect or lack of repair or from serious damage to the structure.

(3) For purposes of this paragraph (f), an applicant who is a "homeless family" is living in substandard housing. For purposes of the preceding sentence, a "homeless family" includes any individual or family who:

(i) Lacks a fixed, regular, and adequate nighttime residence; and

(ii) Has a primary nighttime residence that is:

(A) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. A "homeless family" does not include any individual imprisoned or otherwise detained pursuant to an Act of the Congress or a State law.

(4) For purposes of paragraph (f)(1) of this section, single room occupancy (SRO) housing, as defined in 24 CFR 882.102, is not substandard solely because it does not contain sanitary or food preparation facilities (or both).

(g) *Verification procedures for applicants living in substandard housing.* Verification that an applicant is living in substandard housing consists of certification, in a form prescribed by the Secretary, from a unit or agency of government or from an applicant's present landlord that the applicant's unit has one or more of the deficiencies listed in, or the unit's condition is as described in, paragraph (f)(1) or (2) of this section. In the case of a "homeless family" (as described in paragraph (f)(3) of this section), verification consists of certification, in a form prescribed by the Secretary, of this status from a public or private facility that provides shelter for such individuals, or from the local police department or social services agency.

(h) *Definition of family income.* For purposes of this section, family income is "monthly income", which is one-twelfth of "annual income" as defined in § 905.102.

(i) *Definition of rent.*

(1) For purposes of this section, rent is defined as:

(i) The actual amount due, calculated on a monthly basis, under a lease or occupancy agreement between a family and the family's current landlord; and

(ii) In the case of utilities purchased directly by tenants from utility providers,

(A) The IHA's reasonable estimate of tenant-purchased utilities (except telephone) and the other housing services that are normally included in rent; or

(B) If the family chooses, the average monthly payments that it actually made for these utilities and services for the most recent 12-month period or, if information is not obtainable for the



entire period, for an appropriate recent period.

(2) For purposes of calculating rent under this paragraph (i), amounts paid to or on behalf of a family under any energy assistance program must be subtracted from the otherwise applicable rental amount to the extent that they are not included in the family's income.

(3) In the case of an applicant who owns a manufactured home, but who rents the space upon which it is located, rent under this paragraph (i) includes the monthly payment to amortize the purchase price of the home, as calculated in accordance with HUD's requirements.

(4) In the case of members of a cooperative, rent under this paragraph (i) means the charges under the occupancy agreement between the members and the cooperative.

(j) *Verification of an applicant's income, rent, and utilities payments.* The IHA must verify that an applicant is paying more than 50 percent of family income for rent, as follows:

(1) The IHA must verify the family's income in accordance with the standards and procedures that it uses to verify income for the purpose of determining applicant eligibility and total tenant payment.

(2)(i) An IHA must verify the amount due to the family's landlord (or cooperative) under the lease or occupancy agreement:

(A) By requiring the family to furnish copies of its most recent rental (or cooperative charges) receipts (which may include cancelled checks or money order receipts) or a copy of the family's current lease or occupancy agreement, or

(B) By contacting the landlord (or cooperative) or its agent directly.

(ii) An IHA must verify the amount paid to amortize the purchase price of a manufactured home:

(A) By requiring the family to furnish copies of its most recent payment receipts (which may include cancelled checks or money order receipts) or a copy of the family's current purchase agreement, or

(B) By contacting the lienholder directly.

(3) To verify the actual amount that a family paid for utilities and other housing services, the IHA must require the family to provide copies of the appropriate bills or receipts, or must obtain the information directly from the utility or service supplier.

(k) *Notice and opportunity for a meeting where Federal preference is denied.* If the IHA determines that an applicant does not meet the criteria for

receiving a Federal preference, the IHA must promptly provide the applicant with written notice of the determination. The notice must contain a brief statement of the reasons for the determination, and state that the applicant has the right to meet with the IHA's designee to review it. If requested, the meeting must be conducted by a person or persons designated by the IHA. Those designated may be an officer or employee of the IHA, including the person who made or reviewed the determination, or his or her subordinate. The procedures specified in this paragraph must be carried out in accordance with HUD's requirements. The applicant may exercise other rights if the applicant believes that he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap.

(l) *Closure of waiting list.* Notwithstanding the fact that the IHA may not be accepting additional applications because of the length of the waiting list, the IHA may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for admission and claims that he or she qualifies for a Federal preference under this section, unless the IHA determines, on the basis of the number of applicants who are already on the waiting list and who claim a Federal preference, and the anticipated number of project admissions, that—

(1) There is an inadequate pool of applicants who are likely to qualify for a Federal preference, and

(2) It is unlikely that, on the basis of the IHA's system for applying the Federal preferences, the preference or preferences that the applicant claims, and the preferences claimed by applicants on the waiting list, the applicant would qualify for admission before other applicants on the waiting list.

#### **§ 905.310 Restriction against ineligible aliens. [Reserved]**

#### **§ 905.315 Initial determination, verification, and reexamination of family income and composition.**

(a) *Income, family composition, and eligibility.* The IHA is responsible for determination of annual income and adjusted income, for determination of eligibility for admission and total tenant payment or homebuyer required monthly payment; and for reexamination of family income and composition at least annually for all tenants and Turnkey III homebuyers. The "effective date" of an examination or reexamination refers to: (i) In the case of an examination for admission, the effective date of initial occupancy; and

(ii) in the case of a reexamination of an existing tenant or homebuyer, the effective date of any change in tenant payment or required monthly payment resulting from the reexamination. If there is no change, the effective date is the date a change would have taken place if the reexamination had resulted in a change in payment.

(2) *Verification.* As a condition of admission to, or continued occupancy of, any assisted unit, the IHA shall require the family head and other such family members as it designates to execute a HUD-approved release and consent form (including any release and consent as required under 24 CFR part 760) authorizing any depository or private source of income, or any Federal, State, or local agency, to furnish or release to the IHA and to HUD such information as the IHA or HUD determines to be necessary. The IHA also shall require the family to submit directly the documentation determined to be necessary, including any information required under § 905.310 or 24 CFR part 750. Information or documentation shall be determined to be necessary if it is required for purposes of determining or auditing a family's eligibility to receive housing assistance, for determining the family's adjusted income or tenant rent or required monthly payment, for verifying related information, or for monitoring compliance with equal opportunity requirements. The use or disclosure of information obtained from a family or from another source pursuant to this release and consent shall be limited to purposes directly connected with administration of this part or an application for assistance.

(3) *Rent and homebuyer payment adjustments.* After consultation with the family and upon verification of the information, the IHA shall make appropriate adjustments in the rent or homebuyer payment amount. The tenant or homebuyer shall comply with the IHA's policy regarding required interim reporting of changes in the family's income.

#### **§ 905.320 Determination of rents and homebuyer payments.**

(a) *Rental and Turnkey III projects.* The amount of rent required of a tenant in a rental project or the Turnkey III homebuyer payment amount for a homebuyer in a Turnkey III project for Turnkey III contracts executed after August 1, 1982, shall be equal to the total tenant payment as determined in accordance with § 905.325. For Turnkey III contracts executed on or before August 1, 1982, the Turnkey III



homebuyer payment is determined in accordance with the contract. If the utility allowance exceeds the rent or required monthly payment, the IHA will pay the utility reimbursement as provided in § 905.325(b). In the case of a Turnkey III homebuyer, payment of a utility reimbursement may affect the IHA's evaluation of the Turnkey III homebuyer's homeownership potential. (See § 905.503(c)(3) and § 905.529 regarding loss of homeownership potential and § 905.523 regarding funds to cover such reimbursements.)

(b) *MH projects.* The amount of the required monthly payment for a homebuyer in an MH project is determined in accordance with subpart E of this part.

**§ 905.325 Total tenant payment—Rental and Turnkey III programs.**

(a) *Total tenant payment.* Total tenant payment shall be the highest of the following, rounded to the nearest dollar:

- (1) 30 percent of monthly adjusted income;
- (2) 10 percent of monthly income; or
- (3) If the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the monthly portion of such payments which is so designated. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under this paragraph (a)(3) shall be the amount resulting from one application of the percentage.

(b) *Utility reimbursement.* If the utility allowance exceeds the total tenant payment, the difference (the utility reimbursement) shall be due to the family. If the utility company consents, an IHA may, at its discretion, pay the utility reimbursement directly to the utility company.

**§ 905.335 Rent and homebuyer payment collection policy.**

Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies sufficient to assure the prompt payment and collection of rent payments. A copy of the written policies shall be posted prominently in the IHA office, and shall be provided to a tenant upon request. Such policies must be in accordance with HUD guidelines and will be reviewed by HUD. If an IHA has been determined to be "high risk" (see § 905.135), the IHA policies may be required to be approved by the HUD field office.

**§ 905.340 Grievance procedures and leases.**

(a) *Grievance procedures.* (1) Each IHA shall adopt and promulgate grievance procedures that are appropriate to local circumstances. These procedures shall comply with the Indian Civil Rights Act, if applicable, and section 6(k) of the Act, as applicable, and shall assure that tenants and homebuyers will:

- (i) Be advised of the specific grounds of any proposed adverse action by the IHA;
- (ii) Have an opportunity for a hearing before an impartial party upon timely request;
- (iii) Have an opportunity to examine any documents or records or regulations related to the proposed action;
- (iv) Be entitled to be represented by another person of their choice at any hearing;
- (v) Be entitled to ask questions of witnesses and have others make statements on their behalf; and
- (vi) Be entitled to receive a written decision by the IHA on the proposed action.

(2) An IHA may exclude from its procedure any grievance concerning an eviction or termination of tenancy in any jurisdiction which requires that, before eviction, a tenant (including a homebuyer under a homeownership agreement) be given a hearing in court, if the Secretary has determined that the jurisdiction's procedures provide the basic elements of due process.

(3) A copy of the grievance procedures shall be posted prominently in the IHA office, and shall be provided to any tenant, homebuyer, or applicant upon request.

(b) *Leases.* Each IHA shall use leases that:

- (1) Do not contain unreasonable terms and conditions;
- (2) Obligate the IHA to maintain the project in a decent, safe, and sanitary condition;
- (3) Require the IHA to give adequate written notice of termination of the lease which shall not be less than—
  - (i) A reasonable time, but not to exceed 30 days, when the health or safety of other tenants or IHA employees is threatened;
  - (ii) Fourteen days in the case of nonpayment of rent; and
  - (iii) Thirty days in any other case;
- (4) Require that the IHA may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause; and
- (5) Provide that a tenant, any member of the tenant's household, or a guest or other person under the tenant's control

shall not engage in criminal activity, including drug-related criminal activity, on or near the premises, while the tenant resides in the IHA-owned or controlled property, and such criminal activity shall be cause for termination of tenancy. For purposes of this paragraph, the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

(Information collection requirements contained in paragraph (a) have been approved by the Office of Management and Budget under control number 2577-0006)

**§ 905.345 Maintenance and improvements.**

(a) *General.* Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and tenants. A copy of such policies shall be posted prominently in the IHA office, and shall be provided to an applicant or tenant upon entry into the program and upon request.

(b) *Provisions for rental projects.* For rental projects, the maintenance policies shall contain provisions on at least the following subjects:

- (1) The responsibilities of tenants for normal care and maintenance of their dwelling units, and of the common property, if any;
- (2) Procedures for handling maintenance service requests from tenants;
- (3) Procedures for IHA inspections of dwelling units and common property;
- (4) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and
- (5) Procedures for charging tenants for damages for which they are responsible.

(Information collection requirements contained in paragraph (d) have been approved by the Office of Management and Budget control number 2577-0114)

**§ 905.350 Correction of management deficiencies.**

(a) The IHA shall promptly take such action as may be required by HUD to remedy management deficiencies. HUD shall provide maximum feasible assistance to an IHA to remedy management deficiencies. Particular attention shall be given to the correction of serious deficiencies in any of the following:

- (1) Physical maintenance of the property;
- (2) Occupancy practices;



- (3) Maintenance of accounts and records;
  - (4) Cost controls;
  - (5) Handling of funds;
  - (6) Rent or homebuyer payment collection;
  - (7) Required reports to HUD;
  - (8) IHA staffing and staff turnover; and
  - (9) Tribal government cooperation.
- (b) If an IHA fails to correct serious deficiencies, it may be determined to be "high risk" in accordance with §§ 905.135 and 85.12.

#### 905.360 IHA employment practices.

(a) *Indian preference.* Each IHA shall establish and adopt written policies with respect to the IHA's own employment practices, which shall be in compliance with its obligations under section 7(b) of the Indian Self-Determination and Education Assistance Act, and E.O. 11246, where applicable. A copy of these policies shall be posted in the IHA office, and a copy shall be submitted to HUD promptly after adoption by the IHA. (Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), as amended, which prohibits discrimination in employment by making it unlawful for employers to engage in certain discriminatory practices, excludes Indian Tribes from the nondiscrimination requirements of Title VII.) See also § 905.165(b)(2)(ii).

(b) *Wage rates.* See § 905.120 (c) and (d) with respect to the wage rates applicable to IHA employees.

(Approved by the Office of Management and Budget under OMB control number 2577-0130)

### Subpart E—Mutual Help Homeownership Opportunity Program

#### § 905.401 Scope and applicability.

(a) *Scope.* This subpart sets forth the requirements that are applicable to the MH Homeownership Opportunity Program. For any matter not covered in this subpart, see the provisions of the other subparts contained in this part. Projects developed under the Self-Help development method must comply with the requirements of this subpart and of subpart F.

(b) *Applicability.* The provisions of this subpart are applicable to all MH projects placed under ACC on or after March 9, 1976, and to any projects converted in accordance with § 905.455 or § 905.503.

#### § 905.404 Program framework.

(a) An MH project using a method of development not involving Self-Help, involves three basic contracts: an ACC, an MHO Agreement and a Construction

Contract, each in a form prescribed by HUD. (See § 905.220(d)(i).)

(b) Projects under the Mutual Help form of ACC may not be consolidated with projects under other forms of ACC.

#### § 905.407 Application.

(a) *General—(1) Availability of eligible homebuyers.* An application for an MH project shall include a certification that there is a sufficient number of eligible homebuyers to ensure the viability of the project.

(b) *Sites.* The application must identify the sites and, for Self-Help projects, pre-approved plans and specifications, with only minor modifications.

(1) *Purchase.* An IHA may purchase a homesite if neither the Tribe nor the homebuyers can donate or contribute enough sites suitable for project use.

(2) *Availability of sites for use by another homebuyer.* Each homesite shall be legally and practicably available for use by another homebuyer. If a site is part of other land owned by the prospective homebuyer, the lease or other conveyance to the IHA shall include the legal right of access to the site by any substitute homebuyer.

(3) *Alternative sites and substitution of sites.* In order to minimize delay to the project in the event of the withdrawal of a selected homebuyer or an approved site, the IHA should have a reasonable number of alternates available; and no substitution of a site shall be permitted after final site approval unless the change is necessary by reason of special circumstances and, for an IHA determined to be "high risk", has been approved by HUD.

(c) *Authorizing resolution.* The application must include a certified copy of the resolution adopted by the IHA's Board of Commissioners authorizing the appropriate officers to submit the application to HUD and must indicate approval of participation in the Self-Help program, if applicable.

(Information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under OMB control number 2577-0030)

#### § 905.410 HUD review of application.

(a) *Completeness.* HUD will review each application in accordance with § 905.220 (and § 905.469, if Self-Help development method).

(b) *Program reservation.* When an application ranks high enough for funding, HUD will issue a program reservation and execute an ACC, and the IHA will proceed to submit a development program.

#### § 905.413 Special provisions for development of an MH project.

(a) *MH construction contracts—(1) Special provisions to be included in advertisements.* The advertisement for a construction contract other than one used in Self-Help shall state that:

- (i) The project is an MH project,
- (ii) The contractor may obtain a copy of the proposed MH construction contract, and
- (iii) The contractor may obtain a list of the sites.

(2) *Responsibility of contractor.* The construction contract shall provide that the contractor is responsible for acceptable completion of all the homes.

(b) *Consultation with homebuyers.* The IHA shall provide for soliciting comments from homebuyers and other interested parties, as provided in § 905.225(c), concerning the planning and design of the homes. Any changes resulting from such consultation shall be consistent with HUD standards and cost limitations and shall be subject to IHA and HUD field office approval.

(c) *Financial feasibility.* The application shall be supported by signed applications maintained in the IHA's office of a sufficient number of selected homebuyers who are able and willing to pay the projected administration charge, meet the other obligations under MHO Agreements (see § 905.416(b)), and enter into MHO Agreements. HUD may request submission of the applications, as necessary, to determine feasibility of the development.

(d) *Rights under MHO agreement if project fails to proceed.* Any MHO Agreement shall be subject to revocation by the IHA if the IHA or HUD decides not to proceed with the development of the project in whole or in part. In such event, any contribution made by the homebuyer or Tribe shall be returned. If the contribution was a land contribution, it will be returned to the contributor.

(e) *Mutual Help contribution.* See § 905.419.

(f) *Insurance.* Upon occupancy, the homebuyer is responsible for payment of insurance coverage as part of its administration charge (see § 905.427(b)).

#### § 905.416 Selection of MH homebuyers.

(a) *Admission policies—(1) Low-income families.* An IHA's written admission policies for the MH program, adopted in accordance with § 905.301, must limit admission to low-income families, except as otherwise permitted in this paragraph.

(i) An IHA may provide for admission of applicants whose family income exceeds the levels established for low-



income families to the MH program operated on an Indian reservation or in an Indian area, if the IHA demonstrates to HUD's satisfaction that there is a need for housing for such families that cannot reasonably be met except under this program.

(ii) An IHA may provide for admission of a non-Indian applicant to the MH program operated on an Indian reservation or in an Indian area, if the IHA determines that the presence of the family on the Indian reservation or other Indian area is essential to the well-being of Indian families and the need for housing for the family cannot reasonably be met except under this program. If the IHA permits admission of non-Indians to its MH program, the IHA must specify the criteria it uses to determine whether a family's presence is essential in its admission policies.

(2) *Limitation on number of units for non-low income families.* The number of dwelling units in any project assisted under the MH program that may be occupied by or reserved for families on Indian reservations and other Indian areas whose incomes exceed the levels established for low-income families (*i.e.*, applicants admitted under paragraph (a)(1)(i) of this section) may not exceed whichever of the following is higher:

(i) Ten percent of the dwelling units in the project; or

(ii) Five dwelling units.

(3) *Different standards for MH program.* The IHA's admission policies for MH projects should be different from those for its rental or Turnkey III projects. The policies for the MH program should provide standards for determining a homebuyer's:

—Ability to provide maintenance for the unit; and

—Potential for maintaining at least the current income level.

(b) *Ability to meet homebuyer obligations.* A family shall not be selected for MH housing unless, in addition to meeting the income limits and other requirements for admission (see § 905.301), the family is able and willing to meet all obligations of an MHO Agreement, including the obligations to perform or provide the required maintenance, to provide the required MH Contribution and its own utilities, and to pay the administration charge.

(c) *MH waiting list.* (1) Families who wish to be considered for selection for MH housing shall apply specifically for such housing. A family on any other IHA waiting list, or a tenant in a rental project of the IHA, must also submit an application for selection in order to be considered for an MH project; and

(2) The IHA shall maintain a waiting list, separate from any other IHA waiting list, of families that have applied for MH housing and that have been determined to meet the admission requirements. The IHA shall maintain an MH waiting list in accordance with requirements prescribed by HUD and shall make selections in the order in which they appear on the list.

(d) *Making the selections.* Within 30 days after HUD approval of the application for a project, the IHA must proceed with preliminary selection of as many Homebuyers as there are homes in the project. Preliminary selection of homebuyers must be made from the MH waiting list in accordance with the date of application, qualification for a Federal preference in accordance with § 905.305, other pertinent factors under the IHA's admissions policies established in accordance with § 905.301, and all admissions are subject to 24 CFR part 750. Final selection of a homebuyer will be made only after the site for that homebuyer has received final site approval by IHA certification to HUD, or, for a "high risk" IHA, by the HUD field office, and the form of MH contribution to be made by that homebuyer (or donated for that homebuyer) has been determined.

(e) *Principal residence.* A condition for selection as a homebuyer is that the family agrees to use the home as their principal residence during the term of the MHO Agreement. Ownership or use of a residence other than the MH home that would continue after participation would disqualify a family from the MH program. However, there are two situations that are deemed not to violate the principal residence requirement. First, ownership or use of a secondary home that is necessary for the family's livelihood or for cultural preservation, as described in the IHA's admission and occupancy policy, is acceptable. Second, a family's temporary absence from its MH home, and related subleasing of it is acceptable if it is done for reasons and time periods prescribed in the IHA's admission and occupancy policy.

(f) *Notification of applicants.* The IHA shall give families prompt written notice of whether or not they have been selected. If a family is not selected, the notice must state the basis for the determination and that the family is entitled to an informal hearing by the IHA on the determination, if a request for a hearing is made within a reasonable time (as specified in the notice). Such a hearing should be held within a reasonable time. (Informal review provisions applicable to denial of an application for a Federal preference under § 905.305 are

contained in paragraph (k) of that section.)

(g) *Change in income.* (1) If a family's income changes after selection but before execution of the MHO agreement in such a way as to make it ineligible (either too high or too low), the IHA may reject the family for this program. However, even a family with an income above the low-income limits may be admitted to this program, provided that the number of such families admitted does not exceed the limit stated in paragraph (a)(2) of this section.

(2) If a family's income changes after the MHO agreement is executed but before the unit is occupied so that it no longer qualifies for the program, the IHA may reject the family for this program. If it becomes evident that a family's income is inadequate to meet its obligations, the IHA may counsel the family about other housing options, such as its rental program. Inability of the family to meet its obligations under the homebuyer agreement is grounds for termination of the agreement.

(Information collection requirements have been approved by the Office of Management and Budget under control number 2577-0003)

#### § 905.419 MH contribution.

(a) *Amount and form of contribution.* As a condition of occupancy, the MH homebuyer will be required to provide an MH contribution. Contributions other than labor may be made by an Indian Tribe on behalf of a family.

(1) The value of the contribution must be \$1500.

(2) The MH contribution may consist of land, labor, cash, materials, equipment, or any combination thereof. Land contributed to satisfy this requirement must be owned in fee simple by the homebuyer or must be assigned or allotted to the homebuyer for his or her use before application for an MH unit. Contributions of land donated by another person on behalf of the homebuyer will satisfy the requirement for an MH contribution. A homebuyer may provide cash to satisfy the MH contribution requirement where the cash is used for the purchase of land, labor, or materials or equipment for the homebuyer's home.

(3) The amount of credit for an MH contribution in the case of land, labor, or materials or equipment shall be based upon the market value at the time of the contribution, but in no case will the credit exceed \$1500. In the case of labor, materials or equipment, market value shall be determined by the contractor and the IHA. In the case of land, market value shall be determined by the IHA, but in no case will the credit exceed



\$1,500 per homesite. The use of labor, materials or equipment as MH contributions must be reflected by a reduction in the Total Contract Price stated in the Construction Contract and the amount must be approved by the HUD field office.

(b) *Execution of agreements.* For projects other than Self-Help development projects, MHO Agreements must be signed for all units before execution of the construction contract for the project, unless the IHA obtains approval by the HUD field office of an exception. Land leases for trust land must be signed and approved by BIA before construction start. The MHO Agreement must include the homebuyer's agreement to satisfy the MH contribution requirement before occupancy of the unit.

(c) *Total contribution to be furnished before occupancy.* The homebuyer cannot occupy the unit until the entire MH contribution is provided to the IHA. If the homebuyer is unable or unwilling to provide the MH contribution before occupancy of the project, the MHO Agreement for the homebuyer shall be terminated, any MH contribution paid by the homebuyer shall be refunded in accordance with § 905.446, and the IHA shall select a substitute homebuyer from its waiting list.

(d) *MH contribution in event of substitution of homebuyer.* If an MHO Agreement is terminated and a substitute homebuyer is selected, the amount of MH contribution to be provided by the substitute homebuyer shall be in accordance with paragraph (a) of this section. The substitute homebuyer may not occupy the unit until the complete MH contribution has been made.

(e) *Disposition of contribution.* If an MHO Agreement is terminated by the IHA or the homebuyer before the date of occupancy, the homebuyer may receive reimbursement of the value of the MH contribution made plus other amounts contributed by the homebuyer, in accordance with § 905.446.

#### § 905.422 Commencement of occupancy.

(a) *Notice.* (1) Upon acceptance by the IHA from the contractor of the home as ready for occupancy, the IHA shall determine whether the homebuyer has met all requirements for occupancy, including satisfaction in full of the MH contribution, and fulfillment of mandatory homebuyer counseling requirements. (See § 905.453.) The IHA shall notify the homebuyer in writing that the home is available for occupancy as of a date specified in the notice, which is called the date of occupancy.

(2) If the IHA determines that the homebuyer has not fully provided the MH contribution or met any of the other conditions for occupancy by the date of occupancy, the homebuyer shall be sent a notice in writing. This notice must specify the date by which all requirements must be satisfied and shall advise the homebuyer that the MHO Agreement will be terminated and a substitute homebuyer selected for the unit if the requirements are not satisfied. (See § 905.446 and § 905.419(d).)

(b) *Credits to MH accounts and reserves.* Promptly after the date of occupancy, the IHA shall credit the amount of the MH contribution to the homebuyer's accounts and reserves in accordance with § 905.437 and shall give the homebuyer a statement of the amounts so credited.

#### § 905.425 Inspections, responsibility for items covered by warranty.

(a) *Inspection before move-in and identification of warranties.* (1) To establish a record of the condition of the home on the date of occupancy, the homebuyer (including a subsequent homebuyer) and the IHA shall make an inspection of the home as close as possible to, but not later than, the date the homebuyer takes occupancy. (The record of this inspection shall be separate from the certificate of completion required by § 905.260(f), but the inspections may, if feasible, be combined.) After the inspection, the IHA representative shall give the homebuyer a signed statement of the condition of the home and equipment and a full written description of all homebuyer responsibilities. The homebuyer shall sign a copy of the statement, acknowledging concurrence or stating objections; and any differences shall be resolved by the IHA and a copy of the signed inspection report shall be kept at the IHA. This written statement of the condition of the home shall not limit the homebuyer's right to claim latent defects in construction that may be covered by warranties referenced in paragraph (a)(2) of this section.

(2) Within 30 days of commencement of occupancy of each home, the IHA shall furnish the homebuyer with a list of applicable contractors', manufacturers' and suppliers' warranties, indicating the items covered and the periods of the warranties, and stating the homebuyer's responsibility for notifying the IHA of any deficiencies that would be covered under the warranties.

(b) *Inspections during contractors' warranty periods, responsibility for items covered by contractors', manufacturers' or suppliers' warranties.*

In addition to the inspection required under paragraph (a) of this section, the IHA will inspect the home regularly in accordance with paragraph (c). However, it is the responsibility of the homebuyer, during the period of the applicable warranties, to promptly inform the IHA in writing of any deficiencies arising during the warranty period (including manufacturers' and suppliers' warranties) so that the IHA may enforce any rights under the applicable warranties. If a homebuyer fails to furnish such a written report in time, and the IHA is subsequently unable to obtain redress under the warranty, correction of the deficiency shall be the responsibility of the homebuyer.

(c) *Annual inspections.* The IHA shall perform inspections annually, in accordance with § 905.428.

(d) *Inspection upon termination of agreement.* If the MHO Agreement is terminated for any reason after commencement of occupancy, the IHA shall inspect the home after notifying the homebuyer of the time for inspection and shall give the homebuyer a written statement of the cost of any maintenance work required to put the home in satisfactory condition for the next occupant (see § 905.446).

(e) *Homebuyer permission for inspections; participation in inspections.* The homebuyer shall permit the IHA to inspect the home at reasonable hours and intervals during the period of the MHO Agreement in accordance with rules established by the IHA. The homebuyer shall be notified of the opportunity to participate in the inspection made in accordance with this section.

#### § 905.426 Homebuyer payments—pre-1976 projects.

The amount of the required monthly payment for a homebuyer in an MH project placed under ACC before March 9, 1976 is determined in accordance with the MH Agreement and provisions of §§ 905.315 and 905.102 concerning income. Utility reimbursements are not applicable to the Mutual-Help program.

#### § 905.427 Homebuyer payments—post-1976 projects.

(a) *Applicability.* The amount of the required monthly payment for a homebuyer in an MH project placed under ACC on or after March 9, 1976, and a homebuyer admitted to occupancy in an existing project on or after the conversion of the project in accordance with § 905.455 is determined in accordance with this section.



(b) *Establishment of schedule.* (1) Each homebuyer shall be required to make a monthly payment ("required monthly payment"), in accordance with a schedule determined by the IHA and approved by HUD. The schedule will provide that the minimum required monthly payment equal the administration charge.

(2) Subject to the requirement for payment of at least the administration charge, each homebuyer shall pay an amount of required monthly payment computed by: (i) multiplying adjusted income (determined in accordance with § 905.315) by a specified percentage; and (ii) subtracting from that amount the utility allowance determined for the unit. The specific percentage shall be no less than 15 percent and no more than 30 percent, as determined by the IHA and approved by HUD.

(3) The IHA's schedule shall provide that the required monthly payment may not be more than a maximum amount. The maximum shall not be less than the sum of:

- (i) The administration charge; and
- (ii) The monthly debt service amount shown on the homebuyer's purchase price schedule.

(4) If the "required monthly payment" exceeds the administration charge, the amount of the excess shall be credited to the homebuyer's monthly equity payments account (see § 905.437(b)).

(c) *Administration charge.* The administration charge should reflect differences in expenses attributable to different sizes or types of units. It is the amount budgeted by the IHA for monthly operating expenses covering the following categories (and any other operating expense categories included in the IHA's HUD-approved operating budget for a fiscal year or other period, excluding any operating cost for which operating subsidy is provided):

(1) Administrative salaries, payroll taxes, etc.; travel, postage, telephone and telegraph, office supplies; office space, maintenance and utilities for office space; general liability insurance or risk protection costs; accounting services; legal expenses; and operating reserve requirements (§ 905.431); and

(2) General expenses, such as premiums for fire and related insurance, payments in lieu of taxes, if any, and other similar expenses.

(d) *Adjustments in the amount of the required monthly payment.* (1) After the initial determination of a homebuyer's required monthly payment, the IHA shall increase or decrease the amount of such payment in accordance with HUD regulations to reflect changes in adjusted income (pursuant to a reexamination by the IHA in accordance

with § 905.315), adjustments in the administration charge, or in any of the other factors affecting computation of the homebuyer's required monthly payment.

(2) In order to accommodate wide fluctuations in required monthly payments due to seasonal conditions, an IHA may agree with the homebuyer for payments to be made in accordance with a seasonally adjusted schedule which assures full payment of the required amount for each year.

(e) *Homebuyer payment collection policy.* Each IHA shall establish and adopt written policies, and use its best efforts to obtain compliance to assure the prompt payment and collection of required homebuyer payments. A copy of the policies shall be posted prominently in the IHA office, and shall be provided to a homebuyer upon request. If an IHA has been issued a corrective action order (see § 905.135), the IHA policies may be required to be approved by the HUD field office.

#### § 905.428 Maintenance, utilities, and use of home.

(a) *General.* Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and homebuyers. A copy of such written policies shall be posted prominently in the IHA office, and shall be provided to an applicant or homebuyer upon entry into the program and upon request.

(b) *Provisions for MH projects.* For MH Projects, the written maintenance policies shall contain provisions on at least the following subjects:

(1) The responsibilities of homebuyers for maintenance and care of their dwelling units and common property;

(2) Procedures for providing advice and technical assistance to homebuyers to enable them to meet their maintenance responsibilities;

(3) Procedures for IHA inspections of homes and common property;

(4) Procedures for IHA performance of homebuyer maintenance responsibilities (where homebuyers fail to satisfy such responsibilities), including procedures for charging the homebuyer's proper account for the cost thereof;

(5) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(6) Procedures for charging homebuyers for damage for which they are responsible.

(c) *IHA responsibility in MH projects.* The IHA shall enforce those provisions of a Homebuyer's Agreement under which the homebuyer is responsible for

maintenance of the home. The IHA has overall responsibility to HUD for assuring that the housing is being kept in decent, safe, and sanitary condition, and that the home and grounds are maintained in a manner that will preserve their condition, normal wear and tear excepted. Failure of a homebuyer to meet the obligations for maintenance shall not relieve the IHA of responsibility in this respect. Accordingly, except as discussed below, the IHA shall conduct a complete interior and exterior examination of each home at least once a year, and shall furnish a copy of the inspection report to the homebuyer. The IHA shall take appropriate action, as needed, to remedy conditions shown by the inspection, including steps to assure performance of the homebuyer's obligations under the homebuyer's agreement. The IHA may inspect the home once every three years, in lieu of an annual inspection where the homebuyer:

(1) Is in full compliance with the original terms of the homebuyer's agreement, including payments, and

(2) The home is maintained in decent, safe, and sanitary condition, as reflected by the last inspection by the IHA. However, if at any time the IHA determines that the homebuyer is not in compliance with the homebuyer's agreement, it must reinstitute annual inspections.

(d) *Homebuyer responsibility in MH program.* (1) The homebuyer shall be responsible for routine and nonroutine maintenance of the home, including all repairs and replacements (including those resulting from damage from any cause). The IHA shall not be obligated to pay for or provide any maintenance of the home other than the correction of warranty items reported during the applicable warranty period.

(2) *Homebuyer's failure to perform maintenance.* (i) Failure of the homebuyer to perform maintenance obligations constitutes a breach of the MHO Agreement and grounds for its termination. Upon a determination by the IHA that the homebuyer has failed to perform its maintenance obligations, the IHA shall require the homebuyer to agree to a specific plan of action to cure the breach and to assure future compliance. The plan shall provide for maintenance work to be done within a reasonable time by the homebuyer, with such use of the homebuyer's account as may be necessary, or to be done by the IHA and charged to the homebuyer's account, in accordance with § 905.437. If the homebuyer fails to carry out the agreed-to plan, the MHO agreement



shall be terminated in accordance with § 905.446.

(ii) If the IHA determines that the condition of the property creates a hazard to the life, health, or safety of the occupants, or if there is a risk of damage to the property if the condition is not corrected, the corrective work shall be done promptly by the IHA with such use of the homebuyer's accounts as the IHA may determine to be necessary, or by the homebuyer with a charge of the cost to the homebuyer's accounts in accordance with § 905.437.

(iii) Any maintenance work performed by the IHA shall be accounted for through a work order stating the nature of and charge for the work. The IHA shall give the homebuyer copies of all work orders for the home.

(e) *Homebuyer's responsibility for utilities.* The homebuyer is responsible for the cost of furnishing utilities for the home. The IHA shall have no obligation for the utilities. However, if the IHA determines that the homebuyer is unable to pay for the utilities for the home, and that this inability creates conditions that are hazardous to life, health, or safety of the occupants or threatens damage to the property, the IHA may pay for the utilities on behalf of the homebuyer and charge the homebuyer's accounts for the costs, in accordance with § 905.437. When the homebuyer's account has been exhausted, the IHA shall pursue termination of the homebuyer agreement and may offer the homebuyer a transfer into the rental program if a unit is available.

(f) *Obligations with respect to home and other persons and property.* (1) The homebuyer shall agree to abide by all provisions of the MHO Agreement concerning homebuyer responsibilities, occupancy and use of the home.

(2) The homebuyer may request IHA permission to operate a small business in the unit. An IHA shall grant this authority where the homebuyer provides the following assurances and may rescind this authority upon violation of any of the following assurances:

- (i) The unit will remain the homebuyer's principal residence;
- (ii) The business activity will not disrupt the basic residential nature of the housing site; and
- (iii) The business will not require permanent structural changes to the unit that could adversely affect a future homebuyer's use of the unit. The IHA may rescind such authority whenever any of the above assurances are violated.

(g) *Structural changes.*

(1) A homebuyer shall not make any structural changes in or additions to the

home unless the IHA has determined that such change would not:

(i) Impair the value of the home, the surrounding homes, or the project as a whole; or

(ii) Affect the use of the home for residential purposes.

(2)(i) Additions to the home include, but are not limited to, energy-conservation items such as solar panels, wood-burning stoves, flues and insulation. Any changes made in accordance with this section shall be at the homebuyer's expense, and in the event of termination of the MHO Agreement the homebuyer shall not be entitled to any compensation for such changes or additions.

(ii) If the homebuyer is in compliance with the terms of the MHO Agreement, the IHA may agree to allow the homebuyer to use the funds in the MEPA for betterments and additions to the MH home. In such event, the IHA shall determine whether the homebuyer will be required to replenish the MEPA or if the funds are to be loaned to the homebuyer at an interest rate determined by the IHA. The homebuyer cannot use MEPA funds for luxury items, as determined by the IHA.

(Information collection requirement contained in paragraph (c) has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 and assigned OMB control number 2577-0114)

#### § 905.431 Operating reserve.

(a) The IHA shall maintain an operating reserve for the project in an amount sufficient for working capital purposes, for estimated future nonroutine maintenance requirements for IHA-owned administrative facilities and common property, for the payment of advance premiums for insurance, and for unanticipated project requirements approved by HUD. A contribution to this reserve shall be determined by the IHA and included in the administration charge. The amount of this contribution shall be increased or decreased annually to reflect the needs of the IHA for working capital and for reserves for anticipated future expenditures and shall be included in the operating budget submitted to the HUD field office for approval. If the IHA fails to maintain an adequate operating reserve level, HUD may declare the IHA to be "high risk" and require that the IHA develop a plan for improving its financial condition.

(b) At the end of each fiscal year or other budget period, the project operating reserve shall be:

(1) Credited with the amount by which operating receipts exceed operating

expenses of the project for the budget period, or

(2) Charged with the amount by which operating expenses exceed operating receipts of the project for the budget period, to the extent of the balance in the operating reserve.

#### § 905.434 Operating subsidy.

(a) *Scope.* This section authorizes the use of operating subsidy for Mutual Help projects; establishes eligible costs; and provides for determination of operating subsidy on a uniform basis for all MH projects.

(b) *Eligible costs.* The reasonable cost of an annual independent audit is an eligible cost for operating subsidy. Operating subsidy may also be paid to cover proposed expenditures approved by HUD for the following purposes:

(1) Administration charges for vacant units where the IHA submits evidence to the HUD field office's satisfaction that it is making every reasonable effort to fill the vacancies;

(2) Collection losses due to payment delinquencies on the part of homebuyer families whose MHO Agreements have been terminated and who have vacated the home, and the actual cost of any maintenance (including repairs and replacements) necessary to put the vacant home in a suitable condition for a subsequent homebuyer family. Operating subsidy may be made available for these purposes only after the IHA has previously used all available homebuyer credits. Every reasonable effort shall be made to collect charges from a vacated homebuyer, including court judgments, professional collection services, etc., as appropriate;

(3) The costs of HUD-approved homebuyer counseling program(s) but not in duplication of homebuyer counseling costs funded under a development cost budget (in accordance with subpart C);

(4) HUD-approved costs for training and related travel of IHA staff and Commissioners;

(5) The costs of a HUD-approved professional management contract; and

(6) Operating costs resulting from other unusual circumstances justifying payment of operating subsidy, if approved by HUD.

(c) *Ineligible cost.* No operating subsidy shall be paid for utilities, maintenance, or other items for which the homebuyer is responsible except, as necessary, to put a vacant home in condition for a subsequent family as provided in paragraph (b)(2) of this section.



**§ 905.437 Homebuyer reserves and accounts.**

(a) *Refundable and nonrefundable MH reserves.* The IHA shall establish separate refundable and nonrefundable reserves for each homebuyer effective on the date of occupancy.

(1) The refundable MH reserve represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's cash MH contribution or the value of the labor, materials or equipment MH contribution.

(2) The nonrefundable MH reserve also represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's share of any credits for land contributed to the project and the homebuyer's share of any credit for non-land contributions by a terminated homebuyer.

(b) *Equity accounts—(1) Monthly equity payments account ("MEPA").* The IHA shall maintain a separate MEPA for each homebuyer. The IHA shall credit this account with the amount by which each required monthly payment exceeds the administration charge. Should the homebuyer fail to pay the required monthly payment, the IHA may elect to reduce the MEPA by the amount owed each month towards the administration charge, until the MEPA has been fully expended. The MEPA balance must be comprised of an amount backed by cash actually received in order for any such reduction to be made.

(2) *Voluntary equity payments account ("VEPA").* The IHA shall maintain a separate VEPA for each homebuyer. The IHA shall credit this account with the amounts of any periodic or occasional voluntary payments (in excess of the required monthly payment) that the homebuyer may desire to make to acquire ownership of the home within a shorter period of time. The IHA may amend an individual homebuyer's MHOA to permit a more flexible use of the VEPA for alterations of the unit, cosmetic changes, additions, betterments, etc.

(3) *Investment of equity funds.* Funds held by the IHA in the equity accounts of all the homebuyers in the project shall be invested in HUD-approved investments. Income earned on the investments of such funds shall periodically, but at least annually, be prorated and credited to each homebuyer's equity accounts in proportion to the amount in each such account on the date of proration. If HUD

determines that accounts are not properly managed and has issued a corrective action order pursuant to § 905.135, it may ultimately remove responsibility of the IHA for managing such accounts to a HUD-approved escrow agent.

(c) *Charges for maintenance.* (1) If the IHA has maintenance work done in accordance with § 905.428(a), the cost thereof shall be charged to the homebuyer's MEPA.

(2) At the end of each fiscal year, the debit balance, if any in the MEPA shall be charged, first to the voluntary equity payments account; second, to the refundable MH reserve; and third, to the nonrefundable MH reserve, to the extent of the credit balances in that account and those reserves.

(3) In lieu of charging the debit balance in the MEPA to the homebuyer's refundable MH reserve and/or nonrefundable MH reserve, the IHA may allow the debit balance to remain in the MEPA pending replenishment from subsequent credits to the homebuyer's MEPA.

(4) The IHA shall at no time permit the accumulation of a debit balance in the MEPA in excess of the sum of the credit balances in the homebuyer's refundable and nonrefundable MH reserves, unless the expenditure is required to alleviate a hazard to the life, health or safety of the occupants, or to alleviate risk of damage to the property.

(d) *Disposition of reserves and accounts.* When the homebuyer purchases the home, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 905.440. If the MHO agreement is terminated by the homebuyer or the IHA, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 905.446.

(e) *Use of reserves and accounts; nonassignability.* The homebuyer shall have no right to receive or use the funds in any reserve or account except as provided in the MHO agreement, and the homebuyer shall not, without approval of the IHA and HUD, assign, mortgage or pledge any rights in the MHO agreement or to any reserve or account.

**§ 905.440 Purchase of home.**

(a) *General.* The IHA provides the family an opportunity to purchase the dwelling under the Mutual Help and Occupancy Agreement (a lease with an option to purchase), under which the purchase price is amortized over the period of occupancy, in accordance with a purchase price schedule. For acquisition under the MHO agreement, see paragraph (e) of this section. If a

homebuyer wants to acquire ownership in a shorter period than that shown on the purchase price schedule, the homebuyer may exercise his or her option to purchase the home on or after the date of occupancy, but only if the homebuyer has met all obligations under the MHO agreement. The homebuyer may obtain financing, from the IHA or an outside source, at any time, to cover the remaining purchase price. The financing may be provided using such methods as a mortgage (e.g., see 24 CFR 203.43h), or a loan agreement. If the homebuyer is able to obtain financing from an outside source, the IHA will release the homebuyer from the MHO agreement and terminate the homebuyer's participation in this program. For acquisition under methods other than under the MHO agreement, see paragraph (d) of this section and § 905.443.

(b) *Purchase price and purchase price schedule.—(1) Initial purchase price.* The IHA shall determine the initial purchase price of a home for the homebuyer who first occupies the home, pursuant to an MHO Agreement as follows (unless the IHA, after consultation with the homebuyer, has developed an alternative method of apportioning among the homebuyers, the amount determined in Step 1, and the alternative method has been made a part of the HUD-approved development program):

Step 1: From the estimated Total Development Cost (TDC) (including the full amount for contingencies as authorized by HUD) of the project as shown in the development cost budget in effect at the time of execution of the construction contract, deduct the amounts, if any, not directly attributable to the dwelling cost and equipment, including, but not limited to:

(i) Relocation costs,  
(ii) Counseling costs,  
(iii) The cost of any community, administration or management facilities, including the land, equipment, and furnishings attributable to such facilities as set forth in the development program for the project, and

(iv) The total amount attributable to land for the project

(v) Off-site water and sewer,  
(vi) Other administrative costs associated with the development of the project.

Step 2: Multiply the amount determined in Step 1 by a fraction of which the numerator is the development cost standard for the size and type of home being constructed for the homebuyer, and the denominator is the sum of the unit development cost



standards for the homes of various sizes and types comprising the project.

Step 3: Determine the amount chargeable to development costs, if any, for acquisition of the homesite.

Step 4: Add the amount determined in Step 3 to the amount determined in Step 2. The sum determined under this step shall be the initial purchase price of the home.

(2) *Purchase price schedule.* Promptly after execution of the construction contract, the IHA shall furnish to the homebuyer a statement of the initial purchase price of the home, and a purchase price schedule that will apply, based on amortizing the balance (purchase price less the MH contribution) over a period, not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA, provided that the rate does not exceed the prevailing interest rate for Veterans Administration guaranteed mortgage loans at the time the schedule is established. The IHA may choose to forego charging interest and calculate the payment with an interest rate of zero.

(c) *Purchase price schedule for subsequent homebuyer.*—(1) *Initial purchase price.* When a subsequent homebuyer executes the Mutual Help and Occupancy Agreement, the purchase price for the subsequent homebuyer shall be determined by the IHA based on one of the following procedures: (i) The current appraised value; (ii) the current replacement cost of the home or; (iii) the remaining purchase price of the unit.

(2) *Purchase price schedule.* Each subsequent homebuyer shall be provided with a purchase price schedule, showing the monthly declining purchase price over the term of the MHO agreement, commencing with the first day of the month following the effective date of the agreement.

(d) *Notice of eligibility for financing.* If the IHA offers IHA homeownership financing in accordance with § 905.443 and has funds available for that purpose, it shall determine, at the time of each examination or reexamination of the family's earnings and other income, whether the homebuyer is eligible for that financing. If the IHA determines that the homebuyer is eligible, the IHA shall notify the homebuyer in writing that IHA homeownership financing is available to enable the homebuyer to purchase the home, if the homebuyer wishes to do so and, that if the homebuyer chooses not to purchase the home at that time, all the rights of a homebuyer shall continue (including the right to accumulate credits in the equity

accounts) and all obligations under the MHO agreement shall continue (including the obligations to make monthly payments based on income). The IHA shall convey ownership of the home when the homebuyer exercises the option to purchase and has complied with all the terms of the MHO agreement. The homebuyer can exercise the option to purchase only by written notice to the IHA, in which the homebuyer specifies the manner in which the purchase price and settlement costs will be paid.

(e) *Conveyance of home.*—(i) *Purchase procedure.* In accordance with the MHO agreement, the IHA shall convey title to the homebuyer when the balance of the purchase price can be covered from the amount in the two equity accounts (MEPA and VEPA). The homebuyer may supplement the amount in the equity accounts with reserves or any other funds of the homebuyer.

(2) *Amounts to be paid.* The purchase price shall be the amount shown on the purchase price schedule for the month in which the settlement date falls.

(3) *Settlement costs.* Settlement costs are the costs incidental to acquiring ownership, including the costs and fees for credit report, field survey, title examination, title insurance, inspections, attorneys other than the IHA's attorney, closing, recording, transfer taxes, financing fees and mortgage loan discount. Settlement costs shall be paid by the homebuyer who may use equity accounts or reserves available for the purchase in accordance with paragraph (e)(4) of this section.

(4) *Disposition of homebuyer accounts and reserves.* When the homebuyer purchases the home, the net credit balances in the homebuyer's equity accounts (MEPA and VEPA, as described in § 905.437), supplemented by the nonrefundable MH reserve and then the refundable MH reserve, shall be applied in the following order:

- (i) For the initial payment for fire and extended coverage insurance on the home after conveyance if the IHA finances purchase of the home in accordance with § 905.443;
- (ii) For settlement costs, if the homebuyer so directs;
- (iii) For the purchase price; and
- (iv) The balance, if any, for refund to the homebuyer.

(5) *Settlement.* A home shall not be conveyed until the homebuyer has met all the obligations under the MHO Agreement, except as provided for in § 905.440(e)(8). The settlement date shall be mutually agreed upon by the parties. On the settlement date, the homebuyer shall receive the documents necessary

to convey to the homebuyer the IHA's right, title, and interest in the home, subject to any applicable restrictions or covenants as expressed in such documents. The required documents shall be approved by the attorneys representing the IHA and HUD, and by the homebuyer or the homebuyer's attorney.

(6) *IHA investment and use of purchase price payments.* After conveyance, all homebuyer funds held or received by the IHA from the sale of a unit in a project financed with grants shall be held separate from other project funds, and shall be used for purposes related to low-income housing use, as approved by HUD. Homebuyer funds held or received by the IHA from the sale to a homebuyer of a unit in a project financed by loans are subject to loan forgiveness. Homebuyer funds include the amount applied to payment of the purchase price from the equity accounts (MEPA and VEPA), any cash paid by the homebuyer for application to the purchase price and, if the IHA finances purchase of the home in accordance with § 905.446, any portion of the mortgage payments by the homeowner attributable to payment of the debt service (principal and interest) on the mortgage.

(7) *Removal of home from MH program.* When a home has been conveyed to the homebuyer, whether or not with IHA financing, the unit is removed from the IHA's MH project under its ACC with HUD. If the IHA has provided financing, its relationship with the homeowner is transformed by the conveyance to that of lender, in accordance with the documents executed during settlement.

(8) *Homebuyers with delinquencies.* If a homebuyer has a delinquency at the end of the amortization period, the unit is no longer available for assistance from HUD or the IHA, even though the unit has not been conveyed. The IHA must take action to terminate the MHOA or to develop a repayment schedule for the remaining balance to be completed in a reasonable period, but not longer than three years. The payment should be equal to a monthly pro-rated share of the remaining balance owed by the homebuyer, plus an administrative fee consisting of the cost of insurance and the IHA's processing cost. If the homebuyer fails to meet the requirements of the repayment schedule, the IHA should proceed immediately with eviction.

#### § 905.443 IHA homeownership financing.

(a) *Eligibility.* If the IHA offers homeownership financing, the



homebuyer is eligible for it when the IHA determines that:

(1) The homebuyer can pay (from the balance in the homebuyer's reserves or accounts, or from other sources):

- (i) The amount necessary for settlement costs; and
- (ii) The initial payment for fire and extended coverage insurance carried on the home after conveyance; and
- (iii) Maintenance reserve (at the option of the IHA).

(2) The homebuyer's income has reached the level, and is likely to continue at such level, at which 30 percent of monthly adjusted income is at least equal to the sum of the monthly debt service amount shown on the homebuyer's purchase price schedule and the IHA's estimates (subject to approval by the HUD field office) of the following monthly payments and allowances:

- (i) Payment for fire and extended coverage insurance;
- (ii) Payment for taxes and special assessments, if any;
- (iii) The IHA mortgage servicing charge;
- (iv) Amount necessary for maintenance of the home; and
- (v) Amount necessary for utilities for the home.

(b) *Promissory note, mortgage, and mortgage amortization schedule.*

(1) When IHA homeownership financing is utilized, the homebuyer shall execute and deliver a promissory note and mortgage. The mortgage shall be a first lien on the property recorded by the IHA at the BIA title plant, if applicable, and/or other Tribal approved agencies or departments used for such purposes. It shall be in a form approved by the HUD field office and shall secure performance of all the terms and conditions of the promissory note. The principal amount of the promissory note shall be equal to the amount of the unpaid balance of the purchase price of the home as determined in accordance with § 905.440.

(2) The IHA shall furnish the homebuyer at settlement with a mortgage amortization schedule based on the principal amount of the promissory note. This schedule shall provide for level monthly reduction in and complete amortization of the principal amount of the promissory note, based upon debt service needed to complete the amortization. The amortization period shall commence on the first day of the month following the date of settlement and shall end on the first day after the end of the period shown on the amortization schedule. The rate of interest, if any, shall be determined by the IHA.

(c) *Monthly payment.* The promissory note or mortgage shall require the homeowner to make a monthly payment to the IHA equal to the sum of the following:

(1) *Insurance.* An amount sufficient to provide the IHA with funds for payment of the insurance premium for fire and extended coverage insurance in an amount and on terms acceptable to HUD (which policy shall be maintained until termination of the obligation under the mortgage.)

(2) *Taxes.* An amount sufficient to pay taxes and any special assessments when next due.

(3) *Mortgage service fee.* A representation of the IHA's monthly cost, as approved by HUD.

(4) *Mortgage debt service payment.* As shown on the mortgage amortization schedule.

(5) *Maintenance reserve.* An amount to replenish the reserve when required.

(d) *Application of monthly payment.* Each monthly payment shall be applied by the IHA in the following order:

- (1) Insurance premium;
- (2) Taxes, or payments in lieu of taxes, and special assessments;
- (3) Mortgage servicing charge;
- (4) Monthly debt service; and
- (5) Replenishment of the maintenance reserve, if applicable.

(e) *Reduced payment resulting from reduced income.* If the homeowner's family income is reduced because of circumstances beyond the homeowner's control, to a point where 30 percent of the monthly adjusted income is insufficient to pay the required monthly payment, the IHA must reduce the monthly payment using the following guidelines:

(1) The payment shall be the greater of:

- (i) 30 percent of the monthly adjusted income, or
- (ii) The sum of the monthly amounts for insurance, taxes and assessments, if any, and the mortgage servicing charge.

(2) The period of reduced payments should be for the minimum amount of time projected by the IHA to be needed by the family to recover from the cause of the lost income—normally no longer than 12 months.

(3) The IHA and homeowner should execute a payment plan reflecting the agreed upon reduced payment amount and term.

(4) The IHA will apply the monthly payment, to the extent that there are funds available, in the order specified in paragraph (d) of this section.

(f) *Transformation of MH relationship.* Upon conveyance of the home with IHA financing, the relationship of the IHA and homebuyer

is transformed to that of mortgagee (lender) and mortgagor (borrower), and the MH program rules are no longer applicable to the unit.

#### § 905.446 Termination of MHO agreement.

(a) *Termination upon breach.* (1) In the event the homebuyer fails to comply with any of the obligations under the MHO agreement, the IHA may terminate the MHO agreement by written notice to the homebuyer, enforced by eviction procedures applicable to landlord-tenant relationships. Foreclosure is an inappropriate method for enforcing termination of the homeownership agreement, which constitutes a lease (with an option to purchase). The homebuyer is a lessee during the term of the agreement and acquires no equitable interest in the home until the option to purchase is exercised.

(2) Misrepresentation or withholding of material information in applying for admission or in connection with any subsequent reexamination of income and family composition constitutes a breach of the homebuyer's obligations under the MHO agreement. Termination, as used in the MHO agreement, does not include acquisition of ownership by the homebuyer.

(b) *Notice of termination of MHO agreement by the IHA, right of homebuyer to respond.* Termination of the MHO agreement by the IHA for any reason shall be by written notice of termination. Such notice shall be in compliance with the terms of the MHO agreement and, in all cases, shall afford a fair and reasonable opportunity to have the homebuyer's response heard and considered by the IHA. Such procedures shall comply with the Indian Civil Rights Act, if applicable, and shall incorporate all the steps and provisions needed to comply with State, local, or Tribal law, with the least possible delay. (See § 905.340.)

(c) *Termination of MHO agreement by homebuyer.* The homebuyer may terminate the MHO Agreement by giving the IHA written notice in accordance with the agreement. If the homebuyer vacates the home without notice to the IHA, the homebuyer shall remain subject to the obligations of the MHO agreement, including the obligation to make monthly payments, until the IHA terminates the MHO agreement in writing. Notice of the termination shall be communicated by the IHA to the homebuyer to the extent feasible and the termination shall be effective on the date stated in the notice.

(d) *Disposition of funds upon termination of the MHO agreement.* If the MHO agreement is terminated, the



balances in the homebuyer's accounts and reserves shall be disposed of as follows:

(1) The MEPA shall be charged with:  
(i) Any maintenance and replacement cost incurred by the IHA to prepare the home for the next occupant;

(ii) Any amounts the homebuyer owes the IHA, including required monthly payments;

(iii) The required monthly payment for the period the home is vacant, not to exceed 60 days from the date of receipt of the notice of termination, or if the homebuyer vacates the home without notice to the IHA, for the period ending with the effective date of termination by the IHA; and

(iv) The cost of securing a vacant unit, the cost of notification and associated termination tasks, and the cost of storage and/or disposition of personal property.

(2) If, after making the charges in accordance with paragraph (d)(1) of this section, there is a debit balance in the MEPA, the IHA shall charge that debit balance, first to the VEPA; second, to the refundable MH reserve; and third, to the nonrefundable MH reserve, to the extent of the credit balances in these reserves and account. If the debit balance in the MEPA exceeds the sum of the credit balances in these reserves and account, the homebuyer shall be required to pay to the IHA the amount of the excess.

(3) If, after making the charges in accordance with paragraphs (d)(1) and (2) of this section, there is a credit balance in the MEPA, this amount shall be refunded, except to the extent it reflects the value of land donated on behalf of the family. Similarly, any credit balance remaining in the VEPA after making the charges described above shall be refunded.

(4) Any credit balance remaining in the refundable MH reserve after making the charges described above shall be refunded to the homebuyer.

(5) Any credit balance remaining in the nonrefundable MH reserve after making the charges described above shall be retained by the IHA for use by the subsequent homebuyer.

(e) *Settlement upon termination*—(1) *Time for settlement.* Settlement with the homebuyer following a termination shall be made as promptly as possible after all charges provided in paragraph (d) of this section have been determined and the IHA has given the homebuyer a statement of such charges. The homebuyer may obtain settlement before determination of the actual cost of any maintenance required to put the home in satisfactory condition for the next occupant, if the homebuyer is

willing to accept the IHA's estimate of the amount of such cost. In such cases, the amounts to be charged for maintenance shall be based on the IHA's estimate of the cost thereof.

(2) *Disposition of personal property.* Upon termination, the IHA may dispose of any item of personal property abandoned by the homebuyer in the home, in a lawful manner deemed suitable by the IHA. Proceeds, if any, after such disposition, may be applied to the payment of amounts owned by the homebuyer to the IHA.

(f) *Responsibility of IHA to terminate.*

(1) The IHA is responsible for taking appropriate action with respect to any noncompliance with the MHO agreement by the homebuyer. In cases of noncompliance that are not corrected as provided further in this paragraph, it is the responsibility of the IHA to terminate the MHO agreement in accordance with the provisions of this section and to institute eviction proceedings against the occupant.

(2) As promptly as possible after a noncompliance comes to the attention of the IHA, the IHA shall discuss the matter with the homebuyer and give the homebuyer an opportunity to identify any extenuating circumstances or complaints which may exist. A plan of action shall be agreed upon that will specify how the homebuyer will come into compliance, as well as any actions by the IHA that may be appropriate. This plan shall be in writing and signed by both parties.

(3) Compliance with the plan shall be checked by the IHA not later than 30 days from the date thereof. In the event of refusal by the homebuyer to agree to such a plan or failure by the homebuyer to comply with the plan, the IHA shall issue a notice of termination of the MHO agreement and evict the homebuyer in accordance with the provisions of this section on the basis of the noncompliance with the MHO agreement.

(4) A record of meetings with the homebuyer, written plans of action agreed upon and all other related steps taken in accordance with paragraph (f) shall be maintained by the IHA for inspection by HUD.

(g) *Subsequent use of unit.* After termination of a homebuyer's interest in the unit, it remains as part of the MH project under the ACC. The IHA must follow its policies for selection of a subsequent homebuyer for the unit under the MH program. (See § 905.449(g) for use of unit if no qualified subsequent homebuyer is available.)

#### § 905.449 Succession upon death or mental incapacity.

(a) *Definition of "event."* Event means the death or mental incapacity of all of the persons who have executed the MHO agreement as homebuyers.

(b) *Designation of successor by homebuyer.* (1) A homebuyer may designate a successor who, at the time of the "event", would assume the status of homebuyer, provided that at that time he or she meets the conditions stated in paragraph (c) of this section. The designation shall be made at the time of execution of the MHO agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

(c) *Succession by persons designated by homebuyer.* (1) Upon occurrence of an "event", the person designated as the successor shall succeed to the former homebuyer's rights and responsibilities under the MHO agreement if the designated successor meets the following conditions:

(i) The successor is a family member and will make the home his or her primary residence;

(ii) The successor is willing and able to pay the administration charge and to perform the obligations of a homebuyer under an MHO agreement;

(iii) The successor satisfies program eligibility requirements; and

(iv) The successor executes an assumption of the former homebuyer's obligations under the MHO agreement.

(2) If a successor satisfies the requirements of paragraphs (c)(1) of this section except for paragraph (c)(1)(iii), the successor may execute an outright purchase of the home.

(d) *Designation of successor by IHA.* If at the time of the event there is no successor designated by the homebuyer, or if any of the conditions in paragraph (c) of this section are not met by the designated successor, the IHA may designate, in accordance with its occupancy policy, any person who qualifies under paragraph (c).

(e) *Occupancy by appointed guardian.* If at the time of the event there is no qualified successor designated by the homebuyer or by the IHA in accordance with the foregoing paragraphs of this section, and a minor child or children of the homebuyer are living in the home, the IHA may, in order to protect their continued occupancy and opportunity for acquiring ownership of the home, approve as occupant of the home an appropriate adult who has been appointed legal guardian of the children with a duty to perform the obligations of the MHO agreement in their interest and behalf.



(f) *Succession and occupancy on trust land.* In the case of a home on trust land subject to restrictions on alienation under federal law (including federal trust or restricted land and land subject to trust or restriction under State law), or under State or Tribal law where such laws do not violate federal statutes, a person who is prohibited by law from succeeding to the IHA's interest on such land may, nevertheless, continue in occupancy with all the rights, obligations and benefits of the MHO agreement, modified to conform to these restrictions on succession to the land.

(g) *Termination in absence of qualified successor.* If there is no qualified successor in accordance with the IHA's approved policy, the IHA shall terminate the MHO agreement and select a subsequent homebuyer from the top of the waiting list to occupy the unit under a new MHO agreement. If a new homebuyer is unavailable or if the home cannot continue to be used for low-income housing in accordance with the Mutual Help program, the IHA may submit an application to HUD to approve a disposition of the home, in accordance with subpart M.

#### § 905.452 Miscellaneous.

(a) *Annual statement to homebuyer.* The IHA shall provide an annual statement to the homebuyer that sets forth the credits and debits to the homebuyer equity accounts and reserves during the year and the balance in each account at the end of each IHA fiscal year. The statement shall also set forth the remaining balance of the purchase price.

(b) *Insurance before transfer of ownership, repair or rebuilding—(1) Insurance.* The IHA shall carry all insurance prescribed by HUD, including fire and extended coverage insurance upon the home.

(2) *Repair or rebuilding.* In the event the home is damaged or destroyed by fire or other casualty, the IHA shall consult with the homebuyers as to whether the home shall be repaired or rebuilt. The IHA shall use the insurance proceeds to have the home repaired or rebuilt unless there is good reason for not doing so. In the event the IHA determines that there is good reason why the home should not be repaired or rebuilt and the homebuyer disagrees, the matter shall be submitted to the HUD field office for final determination. If the final determination is that the home should not be repaired or rebuilt, the IHA shall terminate the MHO agreement, and the homebuyer's obligation to make required monthly payments shall be deemed to have

terminated as of the date of the damage or destruction.

(3) *Suspension of payments.* In the event of termination of a MHO Agreement because of damage or destruction of the home, or if the home must be vacated during the repair period, the IHA will use its best efforts to assist in relocating the homebuyer. If the home must be vacated during the repair period, required monthly payments shall be suspended during the vacancy period.

(c) *Notices.* Any notices by the IHA to the homebuyer required under the MHO Agreement or by law shall be delivered in writing to the homebuyer personally or to any adult member of the homebuyer's family residing in the home, or shall be sent by certified mail, return receipt requested, properly addressed, postage prepaid. Notice to the IHA shall be in writing and either delivered to an IHA employee at the office of the IHA, or sent to the IHA by certified mail, return receipt requested, properly addressed, postage prepaid.

#### § 905.453 Counseling of homebuyers.

(a) *General.* The IHA shall provide counseling to homebuyers in accordance with this section. The purpose of the counseling program shall be to develop:

(1) A full understanding by homebuyers of their responsibilities as participants in the MH Project,

(2) Ability on their part to carry out these responsibilities, and

(3) A cooperative relationship with the other homebuyers. All homebuyers shall be required to participate in and cooperate fully in all official pre-occupancy and post-occupancy counseling activities. Failure without good cause to participate in the program shall constitute a breach of the MHO Agreement.

(b) *Contents of the Program.* The counseling program shall consist of a pre-occupancy phase and a post-occupancy phase. While some elements of the program lend themselves more to one phase than the other, counseling in the two phases shall be coordinated and interrelated. The counseling program shall include, but not be limited to, the following areas:

(1) *Explanation of the MH Program.* The homebuyers should be given a full explanation of the MH Program and how each homebuyer relates to the program. Each homebuyer should be made aware of his financial and legal responsibilities and those of the IHA.

(2) *MH Contribution.* Each homebuyer should be given counseling necessary to assure that the homebuyer has a full understanding of and will be able to provide the particular form or forms of

contribution that are required under the MHO Agreement, as well as an understanding of homebuyer rights in connection with the MH contribution.

(3) *Property care and maintenance.* Each homebuyer should be made familiar with the overall operation of basic systems of the home such as electrical, plumbing, heating systems; major appliances such as refrigerators, ranges, dishwashers; minor appliances such as openers, toasters, the surroundings of the home, i.e. yards and gardens; the care and maintenance to be provided by the homebuyer; the basic provisions of all applicable warranties; and the homebuyer's responsibilities in connection with the warranties.

(4) *Budgeting and money management.* Each homebuyer should be counseled on the importance of family budgeting and meeting financial obligations, methods for allocating funds for utilities and any other necessities, the use of credit, and consumer matters.

(5) *Information on community resources and services.* Each homebuyer should be supplied with information relating to resources available in the community to provide services in areas such as educational opportunities, upgrading employment skills, legal services, dental and health care, child care for working mothers, counseling on family problems such as marital problems, alcoholism or drug problems.

(c) *Planning.* (1) The counseling program shall be carefully designed to meet the special needs of the MH Project, and shall be flexible and responsive to the needs of each homebuyer. While many subjects lend themselves to group session, provision should be made for individual sessions, as needed. Individuals should not be required to attend classes on material with which they are familiar unless they can actively participate in the instruction process.

(2) Special attention shall be directed to the needs of working members of the family for sessions to be held during a time when they can attend. There shall be recognition of the communication and value systems of the participants and an understanding and respect for their background and experience. Maximum possible use shall be made of local trainers to insure good communication and rapport.

(3) The program may be provided by the IHA staff, or by contract with another organization, but in either case with voluntary cooperation and assistance of groups and individuals within the community. It is essential that the training entity be completely knowledgeable concerning the MH



Program. Where contractors are utilized, there shall be a close working relationship with the IHA staff who will have the ongoing responsibility for counseling.

(d) *Submissions of Program for approval.* (1) The IHA shall submit to HUD an application for approval of a counseling program and approval of funds for it. The application shall be submitted before any counseling costs are incurred but no later than the submission of the working drawings and specifications.

(2) The application pursuant to paragraph (d)(1) of this section shall include a narrative statement outlining the counseling program, and copies of any proposed contract and other pertinent documents. This statement shall include the following:

(i) A showing that the training entity has the necessary knowledge and capability for effectively carrying out the proposed program, including a statement of the experience and qualifications of the organization and of personnel who will directly provide the counseling.

(ii) A description of the method and instruments to be used to determine individual counseling needs.

(iii) A description of the scope and content of the proposed program, including a detailed breakdown of tasks to be performed, products to be produced, and a time schedule, including provision for progress payments for specific tasks.

(iv) A description of the methods and instruments to be used.

(v) A statement of the local community resources to be used.

(vi) The estimated cost and methods of payment for the task and products to be performed or produced, including separate estimates of costs for the pre-occupancy and post-occupancy phases of the program, and a description of services and funds to be obtained from non-HUD sources, if any.

(3) No counseling costs shall be incurred until the HUD field office has approved the counseling program.

(4) If the counseling program is to be substantially the same as previously approved by HUD, the IHA in lieu of a detailed submission pursuant to paragraph (d)(2) of this section may submit a statement identifying the previously approved counseling program and highlighting any proposed changes.

(e) *Funding.* The development cost for the project shall include an estimated amount for costs of the counseling program not to exceed \$500 multiplied by the number of homes in the Project (including follow-up needs during the management stage, and counseling in

connection with turnover). The approved amount for counseling shall be included in the contract award development cost budget. If the approved amount is less than \$500 per home the amount may, if necessary, be amended up to the \$500 per home limitation with the approval of the HUD field office, but not later than the Final Development Cost Budget.

(f) *Progress reports.* Unless otherwise required in a corrective action order, IHAs shall submit an annual progress report with the annual budget submission to the HUD field office.

(g) *Termination of counseling program.* If HUD determines that an IHA's counseling program is not being properly implemented, the program may be terminated after notice to the IHA stating the deficiencies in program implementation, and giving the IHA 90 days from the date of notification to take corrective action, and in the event of termination the amount included in the Development Cost Budget for the program shall be reduced so as not to exceed expenses already incurred at the time of termination.

#### § 905.455 Conversion of rental projects.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the HUD field office for approval to convert any or all of the units in an existing rental project to the MH program. Any conversion of existing units shall not affect in any way the IHA's status for funding for new development.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the units must be single family detached homes, or apartment/row houses for conversion to condominium/cooperative ownership. In addition, the units must have individually metered utilities and be in decent, safe and sanitary condition. The project(s) which possess the proposed conversion units must have received an approved actual development cost certificate.

(2) Tenants or other applicants to be homebuyers of the proposed conversion units must qualify for the program under § 905.416(b). The entire MH contribution required of the homebuyer must be made before the rental unit occupied by a tenant can be converted to the MH program.

(3) In the case of conversion of apartments or row houses to condominium or cooperative ownership, all units in a structure must be converted, with all occupants at the time of the application qualified, in accordance with paragraph (b)(2) of this section. Any occupants who do not qualify or desire to convert must be

satisfactorily relocated and replaced with qualified occupants before application for conversion of the structure.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The HUD field office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; evidence units are habitable, safe and sanitary; family qualifications as discussed in paragraph (b)(2); and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining rental units must not be adversely affected.

#### § 905.458 Conversion of Mutual Help Projects to Rental Program.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the HUD field office for approval to convert any or all Mutual Help project units to the rental program, wherever or whenever a homebuyer or homebuyers have lost the potential for ownership because of the inability to meet the cost of their homebuyer responsibilities.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the project must have received an approved ADCC.

(2) The remaining balances in any reserve accounts shall be accounted for individually for each unit converted in a manner consistent with project intent and in a manner prescribed by HUD.

(3) The balance remaining in the MEPA, if any, is applied first to outstanding tenant accounts receivable, then to repair of homebuyer maintenance items, and finally returned to the homebuyer.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The HUD field office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining units must not be adversely affected.

#### Subpart F—Self-Help Development in the Mutual Help Homeownership Program

##### § 905.460 Purpose and applicability.

(a) *Purpose.* The purpose of the Self-Help program is to provide an alternate method of developing dwelling units



that will be less costly than other methods of development, will engender community pride and cooperation, and will provide training in construction skills that will have lasting value to participants. If an IHA is interested in pursuing Self-Help development, it organizes a small group of families (six to ten) to build a substantial portion of the homes for all the families in the group, with technical assistance and supervision and materials provided by the IHA, augmented by skilled labor obtained under contract. The participants are individuals and/or families who qualify for participation in the Mutual Help Homeownership Opportunity program who have the ability to furnish their share of the required labor and who agree to participate in the cooperative effort to build homes for all members of the group.

(b) *Applicability.* Any IHA eligible for development funds may submit an application for a Self-Help Mutual Help Homeownership Opportunity project.

#### § 905.463 Basic requirements.

(a) *Contracts.* A Self-Help Mutual Help Homeownership Opportunity project also involves three basic contracts in a form approved by HUD: An ACC for a Mutual Help project executed by HUD and the IHA after approval of the SH project application and after HUD approval of the development program, a Self-Help agreement executed by the participating families and the IHA before construction begins, and a Mutual Help and Occupancy agreement executed by the participating families and the IHA after construction completion. In addition, there may be organizational documents for the organization created by the participating families.

(b) *Family participation.* The project is to be organized so that a small number of families (six to ten) build a substantial portion of their homes and contract for other skilled labor and supplies. Each family must show the desire to work with other families in building their own homes and must have the time to contribute the labor necessary to perform a substantial number of the tasks required in the construction of the homes. Each family must sign a Self-Help agreement with the IHA.

(c) *IHA capacity.* The IHA must have the capacity to provide for the financial, legal, administrative, and technical responsibilities of the program. The IHA is required to provide assurance that the project will be completed, in the form of a letter of credit or its equivalent in an amount equal to ten percent of the

estimated Total Development Cost Standard. The IHA may manage the project itself if it has staff with the necessary background and proven ability to perform responsibly in the field of mutual self-help and in construction; or it may contract with an organization that has this type of experience and ability for a fee that fits within the Total Development Cost Standard. Once an IHA has experience with this method of development, it is encouraged to have several groups of families participating in its Self-Help program for more cost-effective use of the construction supervisors, although each family will work only on the homes of its group.

(d) *IHA responsibilities.* In addition to the responsibilities that an IHA has under the Mutual Help Homeownership Opportunity program (including counseling concerning homeownership responsibilities), the IHA is responsible for the following tasks:

- (1) Selecting participating families from its waiting list;
- (2) Organizing and counseling the families concerning their responsibilities under the Self-Help agreement;
- (3) Preparing the application and development program for the project;
- (4) Deciding, in consultation with the group of families, how the families will share labor, how records will be kept of time worked, and how labor will be exchanged on a basis that is fair to all participating families;
- (5) Contracting for skilled labor;
- (6) Procuring materials and supplies;
- (7) Providing training in construction before and during construction activity, supervising construction on a daily basis, and providing any technical assistance needed during the construction period;
- (8) Inspecting the construction weekly; and
- (9) Terminating any family found to be in default on its obligations, in consultation with the families in the group, and replacing that family with another eligible family.

(e) *Construction tasks.* The IHA's allocation of construction tasks between those that can be done by families as opposed to skilled labor will depend on the skills and experience of the families, as well as the training that can be provided, and any applicable ordinances about the type of work that must be done by certified persons. Examples of the construction tasks that can be allocated are the following:

- (1) *Usually suitable for participating families:* (i) Wall framing and sheathing;
- (ii) Roof and ceiling framing and sheathing;
- (iii) Roofing;

(iv) Installation of siding, exterior trim, porches;

(v) Installation of gutters and downspouts;

(vi) Insulation;

(vii) Interior carpentry, trim, doors;

(viii) Installation of cabinets and counter tops;

(ix) Interior painting;

(x) Exterior painting;

(xi) Installation of electrical fixtures;

(xii) Installation of finish hardware; and

(xiii) Landscaping.

(2) *Usually suitable for skilled labor:*

(i) Excavation;

(ii) Installation of footing, foundation, columns;

(iii) Pouring floor slab or framing;

(iv) Installation of subflooring;

(v) Installation of windows and exterior doors;

(vi) Roughing in of plumbing;

(vii) Sewage disposal;

(viii) Installation of electrical system;

(ix) Drywall or plaster work;

(x) Basement or porch floor, steps;

(xi) Installation of heating system;

(xii) Flooring;

(xiii) Installation of plumbing fixtures; and

(xiv) Grading and paving.

(f) *Funding.* The funding for technical training and supervision of participating families will be provided through development funds, and the cost will be included in the Total Development Cost of the project. The cost of construction supervision and technical assistance shall generally be no more than 15 percent, but may not exceed 20 percent of the TDC of these self-help homes.

(g) *Applicability of Indian preference.* In the selection of contractors to perform construction supervision, skilled labor, or other work under this program, the provisions concerning preference for Indians (§ 905.165) apply. In the selection of participating families, the provisions of § 905.416 apply.

(h) *Building code.* The building code adopted by the IHA in accordance with § 905.260 will apply to the homes constructed under this program.

#### § 905.466 Self-Help agreement.

(a) *Timing.* The obligations under the Self-Help agreement, executed by the IHA and the families in a group selected by the IHA to participate in a Self-Help program, will be contingent upon approval of the development program by HUD. Each family will be obligated to be available to commence work at a time that fits the IHA's schedule for completion of prior tasks by skilled labor, but generally within 120 days of approval of the IHA's Self-Help project



development program by HUD and to complete the work within a period not to exceed two years.

(b) *Pre-construction period.* The Self-Help agreement will provide that, before construction begins, the participating families will be required to organize themselves, with the assistance of the IHA, and to participate in construction skills training.

(c) *Labor contribution.* (1) The Self-Help agreement will specify the construction tasks to be performed by the participating families as their labor contribution and the construction tasks to be performed under contract by skilled laborers. The number of tasks to be performed by the participating families must constitute the vast majority of the tasks. Generally, the construction will be done in stages, with each stage of construction finished with respect to all the homes in the project before moving to the next stage.

(2) The labor performed is not subject to the labor standards specified in section 12 of the United States Housing Act of 1937, 42 U.S.C. 1437j.

(3) The Self-Help agreement will specify the circumstances under which it may be terminated.

(d) *Insurance requirements.* The families are working for themselves, and not the IHA, during the performance of their labor contribution. The Self-Help agreement will provide that the families waive any liability claim against the IHA for any injury that might occur during the development of the project. It is in the best interests of participating families to have their own insurance coverage to cover the possibility of injury. If the IHA is able to obtain insurance coverage at reasonable cost with reimbursement from the families, at their request, to cover this risk, it is encouraged to do so.

(e) *Standard provisions.* The Self-Help agreement will include provisions prohibiting kickbacks and conflict of interest.

(f) *Completion.* The Self-Help agreement will provide that upon successful completion of the family's obligations under it, the family and the IHA will execute a Mutual Help and Occupancy agreement.

#### § 905.469 Application.

(a) *General.* The application for a Self-Help development method of Mutual Help project must comply with the general requirements of § 905.407.

(b) *Need for Self-Help housing.* Evidence of the need for Self-Help housing must be submitted, including the following:

(1) the names, addresses, number of persons in the household, and annual

incomes of the families selected to participate;

(2) the Self-Help agreement;

(3) certification by the IHA that the participating families are believed to have the time and ability to fulfill their obligations under the Self-Help agreement; and

(4) such information as the incomes and sizes of other interested families who appear to be eligible.

(c) *Ability of IHA to administer Self-Help housing.* The IHA must demonstrate its ability to administer the program by identifying the staff members who will supervise construction and provide technical assistance, and describe their experience. If the IHA plans to contract with an outside entity to perform these functions, it must follow the requirements concerning Indian preference. Regardless of the identity of the firm selected to perform this function (whether it is a Farmers Home Administration technical assistance firm or another source), the IHA should identify the firm and briefly describe its experience. The IHA also must demonstrate its capacity to administer the program, in accordance with § 905.463.

#### § 905.472 Development program.

(a) In addition to complying with the requirements of § 905.225, the IHA's development program for a Self-Help project submitted to HUD must include the following:

(1) *IHA coordination plan.* The plan for organizing and implementing the development, including elements comparable to those covered in the standard Mutual Help construction contract, and the method of coordinating work of participating families and skilled contractors.

(2) *Difference in cost.* A description of how the development cost differs from the cost for a project constructed under a construction contract. This difference should reflect the labor contribution, after considering the construction supervision cost.

(3) *Special provisions for acquisition with rehabilitation projects.* A description of the repair or rehabilitation work needed on each home to be acquired. The work needed on all the homes should be reasonably comparable in the amount of labor exchange that is required. The estimated number of hours of labor and a description of the work to be done must be provided.

(4) *Certification of participation.* Certification by the IHA that the participating families have signed the Self-Help agreement and remain able to

fulfill their obligations under the Self-Help agreement.

(5) *Changes since application stage.* Statement of any changes in the data submitted in the application.

(b) HUD will review the development program submitted by an IHA for a Self-Help project with particular attention to the elements listed above.

#### § 905.475 HUD oversight.

(a) *HUD monitoring of Self-Help development.* HUD will contact the IHA on a regular basis to determine whether any problems are developing that require additional technical assistance or consideration of the existence of default by a family or failure of the project.

(b) *Default in a Self-Help project.* (1) If the IHA determines that a participating family is failing to provide its labor contribution, as required in accordance with its Self-Help agreement, it shall counsel the family about its obligations and encourage fulfillment of its responsibilities. If the failure of the family is jeopardizing the progress of the project, the IHA shall declare the family in default and terminate its participation in the project. Upon termination of the participation of one family, the IHA shall move expeditiously to select an alternate family to take over the responsibilities of the terminated family. If another qualified family cannot be found to assume the responsibilities of the terminated family, the unit may be converted to some other development method (e.g. force account, conventional bid, etc.) under the Mutual Help Homeownership Opportunity program. Of course, the IHA must notify HUD of such difficulties in connection with HUD's monitoring responsibilities.

(2) If the IHA determines that an entire group is unable to continue its work to completion of construction, the IHA shall first counsel the group about its obligations and encourage fulfillment of its responsibilities. If counseling is unsuccessful in bringing about satisfactory progress toward completion, the IHA shall declare the families in default and convert the project to a regular Mutual Help Homeownership Opportunity project. The IHA's plan for completing the project must be submitted to HUD for approval. Availability of additional HUD funding for this purpose is not assured.

#### Subpart G—Turnkey III Program

##### § 905.501 Introduction.

(a) *Purpose.* This subpart sets forth the essential elements of the HUD



Homeownership Opportunities Program for low income families (Turnkey III). IHAs and families in Turnkey III units are encouraged to pursue homeownership through (1) transfer to the Mutual Help Program for those families that are in compliance with their Homeownership Agreements; (2) purchase of Turnkey III units by those families, if they are financially able to do so; or (3) continuation in the Turnkey III Program. IHAs are encouraged to consider the conversion of Turnkey III units to some other form of operation where compliance with the requirements of the Turnkey III Program has become infeasible.

(b) *Applicability.* This subpart is applicable to the operation of all Turnkey III Projects operated by IHAs.

(c) *Program framework.* (1) All Turnkey III projects shall be operated in accordance with an executed Annual Contributions Contract (ACC), which includes the "Special Provisions for Turnkey III Homeownership Opportunity Project" and Homebuyer Ownership Opportunity agreements between the IHA and the homebuyer.

(2) A Turnkey III Project may only include units that are to be operated as such under Homebuyer Ownership Opportunity Agreements, including units occupied temporarily by former homebuyers who, as a result of losing homeownership potential, have been transferred to rental status in place, pending the availability of a suitable rental unit. If for any reason it is determined that certain units should be converted to operation as conventional rental units, Mutual Help units, or some other form of operation, such units must be made a part of a conventional rental project, Mutual Help project, or such other project. However, when a homebuyer is converted to rental status while remaining in the same unit, pending availability of a satisfactory rental unit or approval of a request to convert the unit in accordance with § 905.503, the unit remains under the Turnkey III project.

(d) *Contracts, agreements, other documents.* All contracts, agreements and other documents referred to in this subpart must be in a form approved by HUD and no changes of any kind may be made without the written approval of HUD. Contracts, agreements and other documents include but are not limited to: (1) The Annual Contributions Contract (ACC), including the Special Provisions for Turnkey III Projects; (2) the Homebuyer Ownership Opportunity Agreement (Turnkey III Agreement); (3) Certification of Homebuyer Status; (4) Promissory Note for Payment Upon Resale by Homebuyer at Profit; (5)

Articles of Incorporation and Bylaws of the Homebuyer Association (HBA), if any; and (6) Recognition Agreement Between Indian Housing Authority and the Homebuyer Association, if any.

**§ 905.503 Conversion of Turnkey III units and transfer of occupants.**

(a) *General.* Notwithstanding other provisions of this part, Turnkey III Project units may be converted to operation under the Mutual Help Homeownership Program or the Rental Program and the occupants of such units may be transferred to such other form of occupancy, subject to the requirements set forth in this section. This section is not applicable to the transfer of Turnkey III homebuyers who are in breach or default of their Turnkey III Agreement; such cases are to be governed by the terms of the particular Turnkey III Agreement.

(b) *Conversion of Turnkey III units—*  
(1) *General requirements applicable to all conversions.*

(i) The conversion must be endorsed by resolution of the Board of Commissioners and the governing body of the Tribe;

(ii) The conversion must be justified by good cause;

(iii) The conversion must identify specific projects and/or units;

(iv) The project or units must be in habitable, safe and sanitary condition;

(v) In cases where only a portion of the project is to be converted, the operation of the remaining units must be "financially feasible" (so as not to require additional operating subsidy);

(vi) The ACC must be amended to identify the number of units converted and placed under some other form of ACC; and

(vii) The project must have an approved Actual Total Development Cost Certificate (ADCC).

(2) *Special requirements for conversion of units to Mutual Help program.*

(i) Units must have individually metered utility and water facilities;

(ii) The project may not be financed with bonds;

(iii) The units must be placed under a Mutual Help ACC; and

(iv) Eligible homebuyers must be able to execute the Mutual Help Agreement and provide the Mutual Help contribution.

(c) *Transfer of occupants from Turnkey III units to converted units—*(1)

*General requirements applicable to all transfers.*

(i) Turnkey III homebuyers must be in compliance with their Turnkey III Agreement; in certain circumstances, a homebuyer in default for non-payment may be eligible to

transfer to the MH program if the homebuyer can meet the requirements of the MH program and is willing to sign a payback agreement that would satisfy the outstanding debt within at least a three year period. Payments under the payback agreement would be required in addition to the monthly payment under the MH program. The IHA is responsible for terminating the MHO agreement if a homebuyer fails to perform under the payback agreement.

(ii) Homebuyers should be advised of the effects of conversion of the units, termination of their Turnkey III Agreements, and their transfer to another form of occupancy (including but not limited to their rights to eventual homeownership, monthly payment, etc.); and

(iii) Turnkey III Agreements must be terminated in accordance with the terms of that agreement before execution of a new occupancy agreement.

(2) *Special requirements for transfer to Mutual Help program.* (i) Potential Mutual Help homebuyers must be able to satisfy all the requirements of the Mutual Help Program and be capable of assuming the responsibilities of homeownership before transfer; and (ii) Potential homebuyers must provide the Mutual Help contribution upon execution of the Mutual Help Agreement.

(d) *Requirements for submission to HUD.* IHA requests for conversion and transfer must:

(1) Be in writing to the HUD field office and must contain the recommendation of the HUD Regional Administrator;

(2) Identify the project type, number of total project units, and number of units sought to be converted;

(3) Identify the number of Turnkey III occupants that desire conversion of the unit they occupy and transfer to another form of occupancy; and

(4) Include sufficient evidence to support all the general and/or special requirements applicable to the particular conversion or transfer as set forth in this section and in other HUD regulations, contracts, and handbooks.

**§ 905.505 Selection of Turnkey III homebuyers.**

(a) *Admission policies.* In adopting admission regulations, in accordance with § 905.301, an IHA may establish admission policies for Turnkey III projects different from those for rental or Mutual Help projects of the IHA.

(b) *Potential for homeownership.* A family shall not be selected for Turnkey III housing unless, in addition to meeting the income limits and other



requirements for admission (see § 905.301):

(1) the family has an income sufficient to cover the EHPA, NRMH, and the estimated cost of utilities with its required monthly payment (see § 905.315);

(2) the family is able and willing to meet all obligations under the Homebuyer Ownership Opportunity Agreement; and

(3) the family has at least one member who is gainfully employed, or who has an established source of continuing income.

(c) *Turnkey III waiting list.* (1) Families who wish to be considered for selection for Turnkey III housing shall apply specifically for such housing. A family on any other IHA waiting list, or a tenant in a rental project of the IHA, must also submit an application in order to be considered for a Turnkey III Project. The filing of an application for Turnkey III housing by a family that is an applicant for or occupant of Mutual Help or rental housing shall in no way affect its status with regard to the other programs; and

(2) The IHA shall maintain a waiting list, separate from any other IHA waiting list, of families that have applied for Turnkey III housing and that have been determined to meet the admission requirements. The IHA shall maintain a Turnkey III waiting list based on date of application, suitable type or size of unit, and factors affecting preference or priority established by the IHA's regulations.

(d) *Selection and notification of homebuyers.* (1) Homebuyers shall be selected from those families determined to have potential for homeownership. Such selection shall be made in sequence from the waiting list established in accordance with this section.

(2) The applicant for admission must agree to participate and cooperate fully in the IHA's counseling and training for homeownership. Failure to participate as agreed may result in the family not being selected or retained as a homebuyer.

(3)(i) Once a sufficient number of applicants have been selected to assure that the provisions of paragraph (d)(1)(ii) of this section are met, each selected applicant shall be notified of the approximate date of occupancy insofar as such date can reasonably be determined.

(ii) Applicants who are not selected for a specific Turnkey III project shall be so notified in accordance with HUD-approved procedure. The notice shall state the reason for the applicant's rejection and that the applicant will be

given an informal hearing on such determination, regardless of the reason for the rejection, if he or she makes a request for such a hearing within a reasonable time (to be specified in the notice) from the date of the notice.

#### § 905.507 Homebuyer Ownership Opportunity Agreements (HOOA).

(a) *General.* The HOOA must be executed between the IHA and the homebuyer as a condition for occupancy of a Turnkey III unit. The HOOA is a lease agreement which also provides the homebuyer with an option to purchase the home, subject to the homebuyer's compliance with certain conditions. The homebuyer acquires no equity in the home before purchase.

(b) *Pre-Existing Agreements.* (1) Turnkey III Projects in operation on the effective date of this subpart shall be governed by this subpart, except to the extent that the terms of any pre-existing Turnkey III Agreements shall govern the relationship of an IHA and occupant until the termination or cancellation of such agreement(s). If the agreement establishes a maximum or a minimum monthly payment, the terms of the agreement shall govern. However, in no event will the monthly payment charged exceed the Total Tenant Payment determined in accordance with subpart D.

(2) Pre-existing Turnkey III Agreements that determined the required monthly payment in accordance with a "Schedule" developed by the IHA and approved by HUD should continue to determine the monthly payment in accordance with the schedule. This schedule is determined as follows:

(i) The operating budget for the project is based on estimated expenses for a given period of time. The amount needed to operate a particular project is called the breakeven amount. This is comprised of the Operating Expenses (see § 905.515), the total amount needed for EHPA (see § 905.517), and the total needed for NRMH (see § 905.519).

(ii) The aggregate of all homebuyers' incomes is determined. (If no definition of income is stated in the homebuyer's contract, the definition in subpart D is used.)

(iii) The percentage of aggregated income needed to cover 110 percent of the breakeven amount is determined. This percentage is the one that appears in the schedule.

(c) *New agreements.* The schedule to be used for Turnkey III Agreements executed after August 1, 1982 shall comply with the provisions of §§ 905.315-905.325 of this part.

#### § 905.509 Responsibilities of homebuyer.

(a) *Repair, maintenance and use of home.* The homebuyer shall be responsible for the routine maintenance of the home to the satisfaction of the HBA and the IHA. This routine maintenance includes the work (labor and materials) of keeping the dwelling structure, grounds, and equipment in good repair, condition, and appearance, so that they may be utilized continually at their designed capacities and at the satisfactory level of efficiency for their intended purposes, and in conformity with the requirements of local housing codes and applicable regulations and guidelines of HUD. It includes repairs (labor and materials) to the dwelling structure, plumbing fixtures, dwelling equipment (such as range and refrigerator), shades and screens, water heater, heating equipment, and other component parts of the dwelling. It also includes all interior painting and the maintenance of grounds (lot) on which the dwelling is located. It does not include maintenance and replacements provided for by the NRMH, described in § 905.519.

(b) *Repair of damage.* In addition to the obligation for routine maintenance, the homebuyer shall be responsible for repair of any damage caused by members of the homebuyer family or visitors.

(c) *Care of home.* A homebuyer shall keep the home in a sanitary condition; cooperate with the IHA and the HBA in keeping and maintaining the common areas and property, including fixtures and equipment, in good condition and appearance; and follow all rules of the IHA and of the HBA concerning the use and care of the dwellings and the common areas and property.

(d) *Inspections.* A homebuyer shall agree to permit officials, employees, or agents of the IHA and of the HBA to inspect the home at reasonable hours and intervals in accordance with rules established by the IHA and the HBA.

(e) *Use of home.* A homebuyer shall not (1) sublet the home without the prior written approval of the IHA, (2) use or occupy the home for any unlawful purpose nor for any purpose deemed hazardous by insurance companies on account of fire or other risks, or (3) provide accommodations (unless approved by the HBA and the IHA) to boarders or lodgers. The homebuyer shall agree to use the home primarily as a place to live for the family (as identified in the initial application or by subsequent amendment with the approval of the IHA), for children thereafter born to or adopted by members of such family, and for aged or



widowed parents of the homebuyer or spouse who may join the household.

(f) *Obligations with respect to other persons and property.* Neither the homebuyer nor any member of the family shall interfere with rights of other occupants of the development, or damage the common property or the property of others, or create physical hazards.

(g) *Structural changes.* A homebuyer shall not make any structural changes in or additions to the home unless the IHA has first determined in writing that such change would not:

(1) impair the value of the unit, the surrounding units, or the development as a whole, or

(2) affect the use of the home for residential purposes, or

(3) violate HUD requirements as to construction and design.

(h) *Statements of condition and repair.* When each homebuyer moves in, the IHA shall inspect the home and shall give the homebuyer a written statement, to be signed by the IHA and the homebuyer, of the condition of the home and the equipment in it. Should the homebuyer vacate the home, the IHA shall inspect it and give the homebuyer a written statement of the repairs and other work, if any, required to put the home in good condition for the next occupant. The homebuyer or representative and a representative of the HBA may join in any inspections by the IHA.

(i) *Maintenance of common property.* The homebuyer may participate in nonroutine maintenance of the home and in maintenance of common property.

(j) *Assignment and survivorship.* Until such time as the homebuyer obtains title to the home, the following conditions apply:

(1) A homebuyer shall not assign any right or interest in the home or any interest under the Homebuyer Ownership Opportunity Agreement without the prior written approval of the IHA;

(2) In the event of death or mental incapacity, the person designated as the successor in the Homebuyer Ownership Opportunity Agreement shall succeed to the rights and responsibilities under the agreement if that person is a family member and is determined by the IHA to meet all of the standards of potential for homeownership, including the requirement to make the home the person's principal residence. Such person shall be designated by the homebuyer at the time the Homebuyer Ownership Opportunity Agreement is executed. This designation may be changed by the homebuyer at any time.

If there is no such designation, or the designee is not a family member or does not meet the standards of potential for homeownership, the IHA may consider as the homebuyer any family member who meets the standards of potential for homeownership;

(3) If there is no qualified successor in accordance with paragraph (j)(2) of this section, and no minor child of the homebuyer's family is in occupancy, the IHA shall terminate the agreement and another family shall be selected. Where a minor child or children of the homebuyer's family is in occupancy, and an appropriate adult(s) who has been appointed legal guardian of the children is able and willing to perform the obligations of the Homebuyer Ownership Opportunity Agreement in their interest and on their behalf, then in order to protect continued occupancy and opportunity for acquisition of ownership of the home, the IHA may approve the guardian(s) as occupants of the unit with a duty to fulfill the homebuyer obligations under the agreement.

(Information collection requirements contained in paragraphs (g) and (h) have been approved by the Office of Management and Budget under control number 2577-0114.)

#### **§ 905.511 Homebuyers' association and homeowners' association.**

(a) *General.* The homebuyers' association (HBA) and homeowners' association (HOA) are separate and distinct organizations with different functions. The HOA may hold title to and be responsible for maintenance of common property, while the HBA has more general service and representative functions. While all residents are members of the HBA, only those who have acquired title to their homes are members of the HOA.

(b) *HBA.* Except where the homes are on scattered sites (noncontiguous lots throughout a multi-block area with no common property), or where the number of homes in the development may be too few to support an HBA, each Turnkey III development shall have an HBA. For such cases, a modified form of homebuyers association may be called for or a less formal organization may be desirable. This decision shall be made jointly by the IHA and the homebuyers, acting on the recommendation of HUD.

(1) *Organization.* An HBA is an incorporated organization composed of all the families who are entitled to occupancy pursuant to a Homebuyer Ownership Opportunity Agreement or who are homeowners. Each family shall automatically become a member of the HBA, and the HBA shall be the representative of all such families. The

functions of the HBA shall be set forth in its articles of incorporation and by-laws. The IHA shall assist the HBA in its organization and operation to the extent possible.

(2) *Funding.* The IHA may provide non-cash contributions to the HBA, such as office space, as well as cash contributions, which shall be provided for in the annual operating budgets of the IHA. The cash contributions shall be in an amount provided for in the IHA budget and approved by HUD and shall be subject to any HUD restrictions on funding.

(c) *HOA.* A homeowners' association means an association comprised of homeowners, to which the IHA conveys ownership of common property, and which thereafter has responsibilities with respect to the common property.

#### **§ 905.513 Breakeven amount and application of monthly payments.**

(a) *General.* The breakeven amount for a project is the minimum average monthly amount required to provide funds for operating expenses (§ 905.515), the Earned Home Payments Account (EHPA) (§ 905.517), and the Nonroutine Maintenance Reserve (NRMR) (§ 905.519). A separate breakeven amount is established for each size and type of dwelling unit, as well as for the project as a whole. The breakeven amount for EHPA and NRMR will vary by size and type of dwelling unit. Similar variations may occur for operating expenses. The breakeven amount does not include the monthly allowance for utilities for which the homebuyer pays directly.

(b) *Application of monthly payments.* The IHA shall apply the homebuyer's monthly payment as follows:

(1) To the credit of the homebuyer's EHPA;

(2) To the credit of the homebuyer's NRMR; and

(3) For payment of monthly operating expense, including contributions to the operating reserve.

(c) *Excess over breakeven.* When the homebuyer's required monthly payment exceeds the applicable breakeven amount, the excess shall constitute additional project income and shall be deposited and used in the same manner as other project income.

(d) *Deficit in monthly payment.* When the homebuyer's required monthly payment is less than the applicable breakeven amount, the deficit shall be applied as a reduction of that portion of the monthly payment designated for operating expense (*i.e.*, as a reduction of project income). In all cases, the homebuyer payment must be sufficient



to cover the EHPA and the NRM, which shall be credited with the amount included in the breakeven amount for these accounts, but only to the extent that the homebuyer's required monthly payment is sufficient for this purpose. Insufficient homebuyer income to cover the EHPA and the NRM constitutes a loss of homeownership potential and eligibility for continuation in the Turnkey III program. (See §§ 905.505(b) and 905.503(c).)

#### § 905.515 Monthly operating expense.

(a) *Definition and categories of monthly operating expense.* The term *monthly operating expense* means the monthly amount needed for the following purposes:

(1) *Administration.* Administrative salaries, travel, legal expenses, office supplies, etc.;

(2) *Homebuyer services.* IHA expenses in the achievement of social goals, including costs such as salaries, publications, payments to the HBA to assist its operation, contract and other costs;

(3) *Utilities.* Those utilities (such as water), if any, to be furnished by the IHA as part of operating expense;

(4) *Routine maintenance—common property.* For community building, grounds and other common areas, if any. The amount required for routine maintenance of common property depends upon the type of common property included in the development and the extent of the IHA's responsibility for maintenance;

(5) *Protective services.* The cost of supplemental protective services paid by the IHA for the protection of persons and property;

(6) *General expense.* Premiums for fire and other insurance, payments in lieu of taxes to the local taxing body, collection losses, payroll taxes, etc.;

(7) *Nonroutine maintenance—common property (contribution to operating reserve).* Extraordinary maintenance of equipment applicable to the community building and grounds, and unanticipated items for non-dwelling structures.

(b) *Monthly operating expense rate.*

(1) The monthly operating expense rate for each fiscal year shall be established on the basis of the IHA's HUD-approved operating budget for that fiscal year. The operating budget may be revised during the course of the fiscal year in accordance with HUD regulations, contracts, and handbooks.

(2) If it is subsequently determined that the actual operating expense for a fiscal year was more or less than the amount provided by the monthly operating expense established for that

fiscal year, the rate of monthly operating expenses to be established for the next fiscal year may be adjusted to account for the differences.

(c) *Provision for common property maintenance.* During the period the IHA is responsible for the maintenance of common property, the annual operating budget and the monthly operating expense rate shall include the amount required for routine maintenance of all common property in the development, even though a number of the homes may have been acquired by homeowners. During such period, this amount shall be computed on a pro-rata basis of the total number of homes in the development. After the homeowners association assumes responsibility for maintenance of common property, the monthly operating expense shall include an amount equal to the monthly assessment by the homeowners' association for the remaining homes owned by the IHA (see paragraph (a)(7) of this section for nonroutine maintenance of common property).

(d) *Posting of monthly operating expense statement.* A statement showing the budgeted monthly amount allocated in the current operating expense category shall be provided to the HBA and copies shall be provided to homebuyers upon request.

#### § 905.517 Earned Home Payments Account (EHPA).

(a) *Credits to the account.* The IHA shall establish and maintain a separate EHPA for each homebuyer. Since the homebuyer is responsible for maintaining the home, a portion of his required monthly payment equal to the IHA's estimate, approved by HUD, of the monthly cost for such routine maintenance, taking into consideration the relative type and size of the homeowner's home, shall be set aside in the EHPA. In addition, this account shall be credited with:

(1) Any voluntary payments made pursuant to paragraph (f) of this section, and

(2) Any amount earned through the performance of maintenance as provided in paragraph (d) of this section and § 905.519(c).

(b) *Charges to the account.* (1) If for any reason the homebuyer is unable or fails to perform any item of required maintenance as described in § 905.509(a), the IHA shall arrange to have the work done in accordance with the procedures established by the IHA and the HBA, and the cost thereof shall be charged to the homebuyer's EHPA. Inspections of the home shall be made jointly by the IHA and HBA.

(2) To the extent NRM expense is attributable to the negligence of the homebuyer as determined by the HBA and approved by the IHA (see § 905.519), the cost thereof shall be charged to the EHPA.

(c) *Exercise of option; required amount in EHPA.* (1) The homebuyer may exercise his or her option to buy the home by paying the applicable purchase price, only after satisfying the following conditions precedent:

(i) Within the first two years of the homebuyer's occupancy, the homebuyer has achieved a balance in his or her EHPA equal to 20 times the amount of the monthly EHPA credit as initially determined in accordance with paragraph (a) of this section;

(ii) The homebuyer has met, and is continuing to meet, the requirements of the Homebuyers Ownership Opportunity Agreement;

(iii) The homebuyer has rendered, and is continuing to render, satisfactory performance of homebuyer responsibilities to the HBA.

(2) When the homebuyer has met these conditions precedent, the IHA shall give the homebuyer a certificate to that effect. After achieving the required minimum EHPA balance within the first two years of occupancy, the homebuyer shall continue to provide the required maintenance, thereby continuing to add to the EHPA. If the homebuyer fails to meet either the obligation to achieve the minimum EHPA balance, as specified, or the obligation thereafter to continue adding to EHPA, the IHA and the HBA shall investigate and take appropriate corrective action, including termination of the agreement by the IHA in accordance with § 905.529.

(d) *Additional equity through maintenance of common property.* Homebuyers may earn additional EHPA credits by providing in whole or in part any of the maintenance necessary to the common property of the development. When such maintenance is to be provided by the homebuyer, this may be done and credit earned therefor only pursuant to a prior written agreement between the homebuyer and the IHA (or the homeowners' association, depending on who has responsibility for maintenance of the property involved), covering the nature and scope of the work and the amount of credit the homebuyer is to receive. In such cases, the agreed amount shall be charged to the appropriate maintenance account and credited to the homebuyer's EHPA upon completion of the work.

(e) *Investment of excess.* (1) When the aggregate amount of all EHPA balances exceeds the estimated reserve



requirements for 90 days, the IHA shall notify the HBA and shall invest the excess in federally insured savings accounts, federally insured credit unions, and/or securities approved by HUD and in accordance with any recommendations made by the HBA. If the HBA wishes to participate in the investment program, it should submit periodically to the IHA a list of HUD-approved securities, bonds, or obligations which the association recommends for investment by the IHA of the funds in the EHPAs. Interest earned on the investment of such funds shall be prorated and credited to each homebuyer's EHPA in proportion to the amount in each such reserve account.

(2) Periodically, but not less often than semiannually, the IHA shall prepare a statement showing:

(i) The aggregate amount of all EHPA balances;

(ii) The aggregate amount of investments (savings accounts and/or securities) held for the account of all the homebuyers' EHPAs, and

(iii) The aggregate uninvested balance of all the homebuyers' EHPAs. This statement shall be made available to any authorized representative of the HBA.

(f) *Voluntary payments.* To enable the homebuyer to acquire title to the home within a shorter period than anticipated under the original schedule, the homebuyer may, either periodically or in a lump sum, voluntarily make payments over and above the required monthly payments. Such voluntary payments shall be deposited to his credit in the homebuyer's EHPA.

(g) *Delinquent monthly payments.* Under exceptional circumstances as determined by the HBA and the IHA, a homebuyer's EHPA may be used to pay the delinquent required monthly payments, provided the amount used for this purpose does not seriously deplete the account and provided that the homebuyer agrees to cooperate in such counseling as may be made available by the IHA or the HBA.

(h) *Annual statement to homebuyer.* The IHA shall provide an annual statement to each homebuyer specifying at least:

(1) The amount in the EHPA, and

(2) The amount in the NRMR. During the year, any maintenance or repair done on the dwelling by the IHA which is chargeable to the EHPA or to the NRMR shall be accounted for through a work order. A homebuyer shall receive a copy of all such work orders for his or her home.

(i) *Withdrawal and assignment.* The homebuyer shall have no right to assign, withdraw, or in any way dispose of the

funds in its EHPA except as provided in this section or in § 905.525.

(j) *Application of EHPA upon vacating of dwelling.* (1) In the event a Homebuyers Ownership Opportunity Agreement with the IHA is terminated (§ 905.529) or if the homebuyer vacates the home (see § 905.509(j)), the IHA shall charge against the homebuyer's EHPA the amounts required to pay:

(i) The amount due the IHA, including the monthly payments the homebuyer is obligated to pay up to the date he vacates;

(ii) The monthly payment for the period the home is vacant, not to exceed 60 days from the date of notice of intention to vacate, or, if the homebuyer fails to give notice of intention to vacate, 60 days from the date the home is put in good condition for the next occupant in conformity with § 905.509; and

(iii) The cost of any routine maintenance, negligence of the homebuyer, required to put the home in good condition for the next occupant in conformity with § 905.509.

(2) If the EHPA balance is not sufficient to cover all of these charges, the IHA shall require the homebuyer to pay the additional amount due. If the amount in the account exceeds these charges, the excess shall be paid to the homebuyer.

(3) Settlement with the homebuyer shall be made promptly after the actual cost of repairs to the dwelling has been determined (see paragraph (j)(1)(iii) of this section), provided that the IHA shall make every effort to make such settlement within 30 days from the date the homebuyer vacates. The homebuyer may obtain a settlement within 7 days of the date he or she vacates even though the actual cost of such repair has not yet been determined, if the homebuyer has given the IHA notice of intention to vacate at least 30 days before the date the family vacates and if the amount to be charged against the EHPA for such repairs is based on the IHA's estimate of the cost thereof (determined after consultation with the appropriate representative of the HBA).

#### § 905.519 Nonroutine maintenance reserve (NRMR)

(a) *Purpose of reserve.* The IHA shall establish and maintain a separate NRMR for each home, using a portion of the homebuyer's monthly payment. The purpose of the NRMR is to provide funds for the nonroutine maintenance of the home, which consists of the infrequent and costly items of maintenance and replacement shown on the Nonroutine Maintenance Schedule for the home (see

paragraph (b) of this section). Such maintenance may include the replacement of dwelling equipment (such as range and refrigerator), replacement of roof, exterior painting, major repairs to heating and plumbing systems, etc. The NRMR shall not be used for nonroutine maintenance of common property, or for nonroutine maintenance relating to the home to the extent such maintenance is attributable to the Homebuyer's negligence or to defective materials or workmanship.

(b) *Amount of reserve.* The amount of the monthly payments to be set aside for NRMR shall be determined by the IHA, with the approval of HUD, on the basis of the Nonroutine Maintenance Schedule showing the amount likely to be needed for nonroutine maintenance of the home during the term of the Homebuyer Ownership Opportunity Agreement taking into consideration the type or construction and dwelling equipment. This schedule shall:

(1) List each item of nonroutine maintenance (e.g., range, refrigerator, plumbing, heating system, roofing, tile flooring, exterior painting, etc.),

(2) Show for each listed item the estimated frequency of maintenance or useful life before replacement, the estimated cost of maintenance or replacement (including installation) for each occasion, and the annual reserve requirement, and

(3) Show the total reserve requirements for all the listed items, on an annual and a monthly basis. This schedule shall be prepared by the IHA and approved by HUD. The schedule shall be reexamined annually in the light of changing economic conditions and experience.

(c) *Charges to NRMR.* (1) The IHA shall provide the nonroutine maintenance necessary for the home and the cost thereof shall be funded as provided in paragraph (c)(2) of this section. Such maintenance may be provided by the homebuyer but only pursuant to a prior written agreement with the IHA covering the nature and scope of the work and the amount of credit the homebuyer is to receive. The amount of any credit shall, upon completion of the work, be credited to the homebuyer's EHPA and charged as provided in paragraph (c)(2) of this section.

(2) The cost of nonroutine maintenance shall be charged to the NRMR for the home except that:

(i) To the extent such maintenance is attributable to the fault or negligence of the homebuyer, the cost shall be charged to the homebuyer's EHPA after



consultation with the HBA if the homebuyer disagrees, and

(ii) To the extent such maintenance is attributable to defective materials or workmanship not covered by the warranty, or even though covered by the warranty if not paid for thereunder through no fault or negligence of the homebuyer, the cost shall be charged to the appropriate operating expense account of the Project.

(3) In the event the amount charged against the NRMR exceeds the balance therein, the difference (deficit) shall be made up from continuing monthly credits to the NRMR based upon the homebuyer's monthly payments. If there is still a deficit when the homebuyer acquires title, the homebuyer shall pay such deficit at settlement (see paragraph (d)(2) of this section).

(d) *Transfer of NRMR.* (1) In the event the Homebuyer Ownership Opportunity Agreement is terminated, the homebuyer shall not receive any balance or be required to pay any deficit in the NRMR. When a subsequent homebuyer moves in, the NRMR shall continue to be applicable to the home in the same amount as if the preceding homebuyer had continued in occupancy.

(2) In the event the homebuyer purchases the home, and there remains a balance in the NRMR, the IHA shall pay such balance to the homeowner at settlement. In the event the homebuyer purchases and there is a deficit in the NRMR, the homebuyer shall pay such deficit to the IHA at settlement.

(e) *Investment of excess.* (1) When the aggregate amount of the NRMR balances for all the homes exceeds the estimated reserve requirements for 90 days the IHA shall invest the excess in federally insured savings accounts, federally insured credit unions, and/or securities approved by HUD. Income earned on the investment of such funds shall be prorated and credited to each homebuyer's NRMR in proportion to the amount in each reserve account.

(2) Periodically, but not less often than semiannually, the IHA shall prepare a statement showing:

(i) The aggregate amount of all NRMR balances,

(ii) The aggregate amount of investments (savings accounts and/or securities) held for the account of the NRMRs, and

(iii) The aggregate uninvested balance of the NRMRs. A copy of this statement shall be made available to any authorized representative of the HBA.

#### § 905.521 Operating Reserve.

(a) *Purpose of the reserve.* To the extent that total operating receipts (including subsidies for operations)

exceed total operating expenditures of the project, the IHA shall establish an operating reserve up to the maximum approved by HUD in connection with its approval of the annual operating budgets for the project. The purpose of this reserve is to provide funds for:

(1) The infrequent but costly items of nonroutine maintenance and replacements of common property, taking into consideration the types of items which constitute common property, such as nondwelling structures and equipment, and in certain cases, common elements of dwelling structures;

(2) Nonroutine maintenance for the homes to the extent such maintenance is attributable to defective materials or workmanship not covered by warranty;

(3) Working capital, including funds to cover a deficit in a homebuyer's NRMR until such deficit is offset by future monthly payments by the homeowner or a settlement in the event the homebuyer should purchase; and

(4) A deficit in the operation of the project for a fiscal year, including any deficit resulting from monthly payments totaling less than the breakeven amount for the project.

(b) *Nonroutine maintenance—common property (contribution to operating reserve).* The amount under this heading to be included in operating expense (and in the breakeven amount) established for the fiscal year shall be determined by the IHA, with the approval of HUD, on the basis of estimates of the monthly amount needed to accumulate an adequate reserve for the items described in paragraph (a)(1) of this section. This amount shall be subject to revision in the light of experience. This contribution to the operating reserve shall be made only during the period the IHA is responsible for the maintenance of any common property; and during such period, the amount shall be determined on the basis of the requirements of all common property in the development. When the operating reserve reaches the maximum authorized in paragraph (c) of this section, the breakeven (monthly operating expense) computations for the next and succeeding fiscal years need not include a provision for this contribution to the operating reserve unless the balance of the reserve is reduced below the maximum during any such succeeding fiscal year.

(c) *Maximum operating reserve.* The maximum operating reserve that may be retained by the IHA at the end of any fiscal year shall be the sum of:

(1) One-half of total routine expense included in the operating budget approved for the next fiscal year and

(2) One-third of total breakeven amounts included in the operating budget approved for the next fiscal year; provided that such maximum may be increased if necessary as determined or approved by HUD. Total routine expense means the sum of the amounts budgeted for administration, homebuyers' services, IHA-supplied utilities, routine maintenance of common property, protective services, and general expense or other category of day-to-day routine expense.

(d) *Transfer to homeowners' association.* The IHA shall be responsible for and shall retain custody of the operating reserve until the homeowners acquire voting control of the homeowners' association. When the homeowners acquire voting control, the homeowners' association shall then assume full responsibility for management and maintenance of common property under a plan approved by HUD, and there shall be transferred to the homeowners' association a portion of the operating reserve then held by the IHA. The amount of the reserve to be transferred shall be based upon the proportion that one-half of budgeted routine expense (used as a basis for determining the current maximum operating reserve—see paragraph (c) of this section) bears to the approved maximum operating reserve. Specifically, the portion of operating reserve to be transferred shall be computed as follows: Obtain a percentage by dividing one-half of budgeted routine expense by the approved maximum operating reserve; and multiply the actual operating reserve balance by this percentage.

(e) *Disposition of reserve.* If, at the end of a fiscal year, there is an excess over the maximum operating reserve, this excess shall be applied to the operating deficit of the project, if any, and any remainder shall be used for such purposes as approved by HUD under an ACC. Following the end of the fiscal year in which the last home has been conveyed by the IHA, the balance of the operating reserve held by the IHA shall be paid to HUD, or retained by the IHA in a replacement reserve if an ACC amendment has been executed implementing loan forgiveness, provided that the aggregate amount of payments by the IHA under this paragraph shall not exceed the aggregate amount of annual contributions paid by HUD with respect to the project.

#### § 905.523 Operating subsidy.

Operating subsidy may be paid by HUD, subject to the availability of funds for this purpose and at HUD's sole



discretion, to cover an operating deficit as approved by HUD in an operating budget submitted by an IHA for a Turnkey III project. However, operating subsidy or project funds may not be used to establish or maintain the homebuyer reserve accounts. Operating subsidy or project funds may be used on a temporary basis to pay the cost of utilities for an individual unit by way of a utility reimbursement when a homebuyer has insufficient tenant income to cover even the utilities. In such a case, the inability of the homebuyer to pay utilities constitutes a loss of homeownership potential and continuing eligibility for the Turnkey III program. (See § 905.505(b) and § 905.503(c)(3).)

**§ 905.525 Achievement of ownership.**

(a) *Original homebuyer.* (1) The homebuyer may exercise the option to purchase the home and achieve ownership when the amount in his or her EHPA, plus such portion of the NRMR as he or she wishes to use for the purchase, is equal to the purchase price as shown at that time on the homebuyer's purchase price schedule plus all incidental costs. For this purpose, incidental costs mean the costs incidental to acquiring ownership, including, but not limited to, the costs for a credit report, field survey, title examination, title insurance, and inspections, the fees for attorneys other than the IHA's attorney, mortgage application, closing and recording, and the transfer taxes and loan discount payment, if any. If for any reason title to the home is not conveyed to the homebuyer during the month in which the combined total in the EHPA and designated portion of the NRMR equals the purchase price, the purchase price shall be fixed as the amount specified for that month and the homebuyer shall be refunded (i) the net additions, if any, credited to his or her EHPA after that month, and (ii) such part of the monthly payments made by the homebuyer after the purchase price has been fixed which exceeds the sum of the breakeven amount attributable to the unit and the interest portion of the debt service shown in the purchase price schedule.

(2) Where the sum of the purchase price and incidental costs is greater than the amounts in the homebuyer's EHPA and NRMR as described in paragraph (a)(1) of this section, the homebuyer may achieve ownership by obtaining financing for or otherwise paying the excess amount. The purchase price shall be the amount shown on the homebuyer's purchase price schedule for the month in which the settlement date for the purchase occurred.

(3) The maximum period for achieving ownership shall be 30 years, but depending upon increases in the homebuyer's income and the amount of credit which the homebuyer can accumulate through maintenance and voluntary payments, the period may be shortened accordingly.

(b) *Subsequent homebuyer—(1) Determination of initial purchase price.* The initial purchase price for a subsequent homebuyer shall be an amount equal to (i) the purchase price shown in the initial homebuyer's purchase price schedule as of the date of the agreement with the subsequent homebuyer plus (ii) the amount, if any, by which the appraised fair market value of the home, determined or approved by HUD as of the same date, exceeds the purchase price specified in paragraph (b)(1)(i) of this section.

(2) *Purchase price schedule.* The subsequent homebuyer's purchase price schedule shall be the same as the unexpired portion of the initial homebuyer's purchase price schedule except that where the purchase price includes an additional amount as specified in paragraph (b)(1)(ii) of this section, the initial homebuyer's purchase price schedule shall be supplemented by an additional purchase price schedule for such additional amount based upon the same monthly debt service and the same interest rate as applied to the initial homebuyer's purchase price schedule.

(3) *Residual receipts.* After payment in full of the IHA's debt, if there are any subsequent homebuyers who have not acquired ownership of their homes, the IHA shall retain all residual receipts from the operation of the project in a replacement reserve, including payments received on account of any additional purchase price schedules applicable to the homes.

(4) *Transfer of title to homebuyer.* When the homebuyer is to obtain ownership, a closing date shall be mutually agreed upon by the parties. On the closing date the homebuyer shall pay the required amount of money to the IHA, sign the promissory note in accordance with § 905.527, and receive a deed for the home.

**§ 905.527 Payment upon resale at profit.**

(a) *Promissory note.* (1) When a homebuyer achieves ownership, the homebuyer shall sign a note obligating him or her to make payment to the IHA, subject to the provisions of paragraph (a)(2) of this section, in the event he or she resells the home at a profit within 5 years of actual residence in the home after becoming a homeowner. If, however, the homeowner should

purchase and occupy another home within one year (18 months in the case of a newly constructed home) of the resale of the Turnkey III home, the IHA shall refund to the homeowner the amount previously paid under the note, less the amount, if any, by which the resale price of the Turnkey III home exceeds the acquisition price of the new home, provided that application for such refund shall be made no later than 30 days after the date of acquisition of the new home.

(2) The note to be signed by the homebuyer pursuant to paragraph (a)(1) of this section shall be a noninterest-bearing promissory note to the IHA. The note shall be executed at the time the homebuyer becomes a homeowner and shall be secured by a second mortgage. The initial amount of the note shall be computed by taking the appraised value of the home at the time the homebuyer becomes a homeowner and subtracting:

(i) The homebuyer's purchase price plus incidental costs (as described in § 905.525(a)(1)) and

(ii) The increase in value of the home, determined by appraisal, caused by improvements paid for by the homebuyer with funds from sources other than the EHPA or NRMR. The note shall provide that this initial amount shall be automatically reduced by 20 percent thereof at the end of each year of residency as a homeowner, with the note terminating at the end of the five-year period of residency, as determined by the IHA. To protect the homeowner, the note shall provide that the amount payable under it shall in no event be more than the net profit on the resale, that is, the amount by which the resale price exceeds the sum of:

(A) The homebuyer's purchase price plus incidental costs,

(B) The costs of the resale, including commissions and mortgage prepayment penalties, if any, and

(C) The increase in value of the home, determined by appraisal, due to improvements paid for as a homebuyer (with funds from sources other than the EHPA or NRMR) or as a homeowner.

(3) Amounts collected by the IHA under such notes shall be retained by the IHA for use in making refunds pursuant to paragraph (a)(1) of this section. After expiration of the period for the filing of claims for such refunds, any remaining amounts shall be used for such purposes as may be authorized or approved by HUD under such Annual Contributions Contract as the IHA may then have with HUD.

(b) *Residency requirements.* The five-year note period does not end if the homeowner rents or otherwise does not



use the home as his or her principal place of residence for any period within the first five years after achieving ownership. Only the actual amount of time the homeowner is in residence is counted, and the note shall be in effect until a total of five years time of residence has elapsed, at which time the homeowner may request the IHA to release him or her from the note, and the IHA shall do so.

**§ 905.529 Termination of Homebuyer Ownership Opportunity Agreement.**

(a) *Termination by IHA.* (1) In the event the homebuyer should breach the Homebuyer Ownership Opportunity Agreement by failure to make the required monthly payment within ten days after its due date, by misrepresentation or withholding of information in applying for admission or in connection with any subsequent reexamination of income and family composition, by failure to comply with any of the other homebuyer obligations under the agreement, by loss of homeownership potential (beyond a temporary, unforeseen change in circumstances) (see § 905.503(c)(3)), an income that requires outright purchase (see § 905.525(b)), the IHA may terminate the agreement 30 days after giving the homebuyer notice of its intention to do so in accordance with paragraph (a)(2) of this section.

(2) Notice of termination by the IHA shall be in writing. Such notice shall state:

- (i) The reason for termination;
- (ii) That the homebuyer may respond to the IHA, in writing or in person, within a specified reasonable period of time regarding the reason for termination;
- (iii) That in such response the homebuyer may be represented by the HBA;
- (iv) That the IHA will consult the HBA concerning this termination;
- (v) That unless the IHA rescinds or modifies the notices, the termination shall be effective at the end of the 30-day notice period; and
- (vi) That, in the case of termination as a result of loss of homeownership potential when the homebuyer is otherwise in compliance with the agreement, the family will be offered a transfer to a rental unit (whether or not in concert with a conversion of that unit to the rental program). If a rental unit of appropriate size is available, the family will be notified of a transfer to that unit. If no other unit is then available and the homebuyer's current unit is not to be converted to rental, the family will be notified that it may remain in place until an appropriate rental unit becomes

available (in which case the unit remains under the Turnkey III project). Otherwise, the notice shall state that the transfer shall occur as soon as a suitable rental unit is available for occupancy, but no earlier than 30 days from the date of the notice. The notice shall also state that if the homebuyer should refuse to move under such circumstances, the family may be required to vacate the homebuyer unit, without further notice.

(b) *Termination by the homebuyer.* The homebuyer may terminate the Homebuyer Ownership Opportunity Agreement by giving the IHA 30 days notice in writing of this intention to terminate and vacate the home. In the event that the homebuyer vacates the home without notice to the IHA, the agreement shall be terminated automatically and the IHA may dispose of, in any manner deemed suitable by it, any items of personal property left by the homebuyer in the home.

(c) *Transfer to the rental program.* In the event of termination of the Homebuyer Ownership Opportunity Agreement by the IHA or by the homebuyer with adequate notice, the homebuyer may be transferred to a suitable unit in the rental program, in accordance with § 905.503(c)(3)(ii) or terminated from occupancy. If the homebuyer is transferred to the rental program, the amount in the homeowner's EHPA shall be paid in accordance with § 905.517(j).

**Subpart H—Lead-Based Paint Poisoning Prevention**

**§ 905.551 Purpose and applicability.**

The purpose of this subpart is to implement the provisions of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4821–4846, by establishing procedures to eliminate as far as practicable the immediate hazards from the presence of paint which may contain lead in IHA-owned housing assisted under the United States Housing Act of 1937. This subpart applies to IHA-owned low income housing projects, including Turnkey III, Mutual Help and conveyed Lanham Act and Public Works Administration projects, and to section 23 Leased Housing Bond-Financed projects. This subpart does not apply to projects under the section 23 Leased Housing Non-Bond-Financed Program, the section 10(c) Leased Housing Program, and the section 23 and section 8 Housing Assistance Payments programs. This subpart is promulgated in accordance with the authorization granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements

prescribed by subpart C of 24 CFR part 35.

**§ 905.553 Testing and abatement applicable to development.**

(a) *Pre-acquisition testing.* With respect to development, all existing properties constructed before 1978 (or substantially rehabilitated before 1978) and proposed to be acquired for family projects (whether or not they will need rehabilitation) shall be tested for lead-based paint on applicable surfaces (as defined in subpart A).

(b) *Pre-occupancy abatement.* If units containing lead-based paint are acquired, compliance with parts 35 and this subpart is required, and abatement shall be completed before occupancy.

(c) *Compliance with guidelines.* It is strongly encouraged, but not required, that all such properties be tested in accordance with the Lead-Based Paint Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing (hereafter, "Lead-Based Paint Interim Guidelines"), which were published at 55 FR 14555 and 55 FR 39874 (1990), as periodically amended or updated, and other future official departmental issuances related to lead-based paint, before any irrevocable commitment is made to acquire the property. Properties that have already been tested in accordance with the Lead-Based Paint Poisoning Prevention Act as amended by the Housing and Community Development Act of 1987 need not be tested again. If lead-based paint is found in a property to be acquired, the cost of testing and abatement shall be considered when making the cost comparison to justify new construction, as well as when meeting maximum total development cost limitations.

**§ 905.555 Testing and abatement applicable to modernization.**

(a) *Applicability of requirements—(1) General.* With respect to modernization, the IHA shall comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846) and HUD implementing regulations (24 CFR part 35 and this subpart). The five-year funding request plan for CIAP (as described in § 905.610) shall be amended to include the schedule for lead-based paint testing and abatement. Random testing shall be completed by December 6, 1994 (42 U.S.C. 4822(d)(2)(B)). Testing and abatement shall be completed with respect to all family projects constructed or substantially rehabilitated before 1978 approved for (or applications for) comprehensive and homeownership modernization; other pre-1978 family



projects not undergoing comprehensive and homeownership modernization; and special purpose modernization. Any previous testing or abatement work that was done in accordance with the June 6, 1988 regulation (53 FR 20790) or the Lead-Based Paint Poisoning Prevention Act as amended by the Housing and Community Development Act of 1987 shall not be redone to comply with the requirements of this section.

(2) *Special Purpose.* The requirements for lead-based paint testing and abatement apply to the following three categories of special purpose modernization: vacant unit reduction; accessibility for handicapped (for any dwelling in such housing in which any child who is less than 7 years of age resides or is expected to reside); and cost effective energy efficiency measures. In the case of funding for accessibility for the handicapped and cost-effective energy efficiency measures, LBP testing and abatement shall be performed only when the rehabilitation involves removal of walls, doors and windows. The HUD field office may determine on a case-by-case basis whether lead-based paint testing and abatement should be allowed for an IHA requesting special purpose modernization for physical improvements to replace or repair major equipment systems or structural elements (such as, the exterior of buildings). With regard to lead-based paint testing for special purpose modernization, if the project has already been randomly sampled before May 15, 1991, using the criteria found in the June 6, 1988 regulations or after May 15, 1991, using the criteria outlined in paragraph (b) of this section. If lead-based paint is found as a result of previous random testing or current testing, it must be abated.

(b) *Which standards apply—(1) Comprehensive, special purpose, and homeownership modernization in progress.* With respect to family projects approved for comprehensive, special purpose, and homeownership modernization (assisted under section 14 of the Act) that may contain lead-based paint for which funds were reserved by HUD by May 15, 1991, the following standards apply:

(i) IHAs that awarded any construction contract (including architectural and engineering (A&E) contracts) before April 1, 1990, are subject to the provisions regarding random testing and abatement in effect at the time of award.

(ii) IHAs that advertise for bid or award a construction contract (including A&E contracts) or plan to start force account work on or after April 1, 1990,

excluding those contracts solely for emergency work items, shall not execute these contracts until random testing as described in this section has taken place and any necessary abatement as described in this section is included in the modernization budget.

(2) *Applications for comprehensive, special purpose, and homeownership modernization projects.* With respect to applications for family projects for comprehensive, special purpose, and homeownership modernization (assisted under section 14 of the Act) which may contain lead-based paint, no construction contracts awarded on or after April 1, 1990 (including A&E contracts and force account work), excluding those contracts solely for emergency work items, shall be executed until random testing as described in this section has taken place and any necessary abatement as described in this section is included in the modernization budget.

(3) *Lead-based paint modernization; other family projects not undergoing comprehensive, special purpose, or homeownership modernization.* Any pre-1978 family project (assisted under section 14 of the Act) not undergoing comprehensive, special purpose, or homeownership modernization (as covered in paragraph (b) (1) and (2) of this section) including a pre-1978 family project that previously has been modernized with comprehensive, special purpose or homeownership modernization grants under previous regulations shall be randomly tested as described in this section if lead-based paint is found, unless testing and abatement was previously done in accordance with paragraph (a) of this section.

(c) *Testing—(1) Random testing.* Random testing as described in this paragraph (c)(1) is an eligible cost under lead-based paint modernization and is a planning cost as described in § 905.605(d). Interior common areas to be sampled include IHA-owned or operated child care facilities.

(i) *Initial random test.* IHAs shall use random testing on family projects (including homeownership units) constructed or substantially rehabilitated before 1978. It is strongly recommended, but not required, that IHAs use the random testing methodology set forth in the lead-based paint interim guidelines, as periodically amended or upgraded, and other future outstanding departmental issuances in effect at the time of testing. Random testing shall be scheduled or prioritized by age of the family projects and whether the family projects are known

to have lead-based paint or the presence of previous EBLs.

(ii) *Followup.* If evidence of lead-based paint is found in units that were in the random sample, the IHA is required to:

(A) Test the corresponding surfaces where lead-based paint was found in other units of the universe being tested; or

(B) Abate all like surfaces in that universe without further testing.

(2) *Universal testing.* For scattered site family projects involving single-unit structures that are not contiguous or were built and/or rehabilitated at different times, the IHA shall cause each unit to be tested for lead-based paint.

(d) *Abatement.* Abatement shall be performed in accordance with § 905.570. Abatement within a comprehensive and homeownership modernization project should be prioritized in relation to the immediacy of the hazards to children under seven years of age.

(Information collection requirements contained in this section were approved by the Office of Management and Budget under control number 2577-0090)

#### § 905.560 Notification.

(a) *General LBP Hazard Notification for all Residents.* Tenants in IHA-owned low income public housing projects constructed before 1978 shall be notified:

(1) That the property was constructed before 1978;

(2) That the property may contain lead-based paint;

(3) Of the hazards of lead-based paint;

(4) Of the symptoms and treatment of lead-based paint poisoning;

(5) Of the precautions to be taken to avoid lead-based paint poisoning (including maintenance and removal techniques for eliminating such hazards); and

(6) Of the advisability and availability of blood lead level screening for children under seven years of age. Tenants shall be advised to notify the IHA if a child is identified as having an elevated lead blood level (EBL) condition.

(b) *Lead-Based Paint Hazard Notification for Applicants and prospective purchasers.* A notice of the dangers of lead-based paint poisoning and a notice of the advisability and availability of blood lead level screening for children under seven years of age shall be provided to every applicant family at the time of application. The applicant family shall be advised, if screening is utilized and an EBL condition identified, to notify the IHA.



(c) *Notification of Positive Lead-Based Paint Test Results.* In the event that an IHA-owned project constructed or substantially rehabilitated before 1978 is tested and the test results using an x-ray fluorescence analyzer (XRF) are identified as having a lead content greater than or equal to 1.0 mg/cm<sup>2</sup>, or is tested by laboratory chemical analysis (atomic absorption spectroscopy (AAS)) and found to contain .5% lead by weight or more, the IHA shall provide written notification of such result to the current residents, applicants, prospective purchasers, and homebuyers of such units in a timely manner. The IHA shall retain written records of the notification.

**§ 905.565 Maintenance obligation; defective paint surfaces.**

In family projects constructed or substantially rehabilitated before 1978, the IHA shall visually inspect units for defective paint surfaces as part of routine periodic unit inspections. If defective paint surfaces are found, covering or removal of the defective paint spots as described in § 35.24(b)(2) shall be required. Treatment shall be completed within a reasonable period of time.

**§ 905.570 Procedures involving EBLs.**

(a) *Procedures where a current resident child has an EBL.* When a child residing in an IHA-owned low income housing project has been identified as having an EBL, the IHA shall:

(1) Test all surfaces in the unit and applicable surfaces of any IHA-owned and operated child care facility if used by the EBL child for lead-based paint and abate the surfaces found to contain lead-based paint. Testing of exteriors and interior common areas (including non-dwelling IHA facilities that are commonly used by the EBL child under seven years of age) will be done as considered necessary and appropriate by the IHA and HUD; or

(2) Transfer the family with an EBL child to a post-1978 or to a previously tested unit that was found to be free of lead-based paint hazards or in which such hazards have been abated as described in this section.

(b) *Procedures where a non-resident child using an IHA-owned or operated child care facility has an EBL.* When a non-resident child using an IHA-owned or operated child care facility has been identified as having an EBL, the IHA shall test all applicable surfaces of the IHA-owned or operated child care facility and abate the surfaces found to contain lead-based paint.

(c) *Testing.* Testing shall be completed within five days after notification to the IHA of the identification of the EBL

child. It is strongly recommended, but not required, that IHAs use the testing methods outlined in the Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing (Lead-Based Paint Interim Guidelines), published at 55 FR 14555, April 18, 1990, part II, with an amendment of chapter 8 and typographical clarifications at 55 FR 39874, as periodically amended or updated, and other future official departmental issuances related to lead-based paint. A qualified inspector or laboratory shall certify in writing the precise results of the inspection. Testing services available from State, local or Tribal health or housing agencies or an organization recognized by HUD shall be utilized to the extent available. If the results equal or exceed a level of 1 mg/cm<sup>2</sup> or .5% by weight, the results shall be provided to the tenant or the family of the EBL child using the IHA-owned or operated child care facility. Testing will be considered an eligible modernization cost under subpart I only upon IHA certification that testing services are otherwise unavailable.

(d) *Hazard abatement requirements—*  
(1) *Abatement actions.* Hazard abatement actions shall be carried out in accordance with the following requirements and order of priority:

(i) *Unit housing a child with an EBL.* Any surface in the unit found to contain lead-based paint shall be treated. Where full treatment of a unit housing an EBL child cannot be completed within five days after positive testing, emergency intervention actions (including removing defective lead-based paint and scrubbing surfaces after such removal with strong detergents) shall be taken within such time. Full treatment of a unit housing an EBL child shall be completed within 14 days after positive testing, unless funding sources are not immediately available. In such event, the IHA may use its operating reserves and, when necessary, may request reimbursement from the current fiscal year CIAP funds, or request the reprogramming of previously approved CIAP funds.

(ii) *IHA-owned or operated child care facility used by a child with an EBL.* Any applicable surface found to contain lead-based paint shall be treated.

(iii) *Interior common areas (including nondwelling IHA facilities that are commonly used by EBL children under seven years of age) and exterior surfaces of projects in which children with EBLs reside.* Abatement shall be provided to all surfaces containing lead-based paint.

(2) *Abatement methods.* IHAs shall select a safe and cost effective

treatment for surfaces found to contain lead-based paint, including clean-up procedures, and are strongly encouraged, but not required, to follow those methods specified in the Lead-Based Paint Interim Guidelines, and other future official departmental issuances relating to lead-based paint abatement in effect at the time the surfaces are to be abated. Certain prohibited abatement methods are set forth in § 35.24(b)(2)(ii) of this title. Final inspection and certification after treatment shall be made by a qualified inspector, industrial hygienist, or local health official based on clearance levels specified in HUD departmental issuances and guidelines.

(3) *Tenant protection.* The IHA shall take appropriate action to protect tenants including children with EBLs, other children, and pregnant women, from hazards associated with abatement procedures, and is strongly encouraged, but not required, to take actions more fully outlined in the Lead-Based Paint Interim Guidelines and other future official departmental issuances related to tenant protection in effect at the time the abatement procedure is undertaken. Tenant relocation may be accomplished with CIAP assistance.

(4) *Disposal of lead-based paint debris.* The IHA shall dispose of lead-based paint debris in accordance with applicable local, State or Federal requirements. Additional information covering disposal practices is contained in the Lead-Based Paint Interim Guidelines and other future official departmental issuances relating to lead-based paint. In any event, EPA has primary responsibility for waste disposal regulations and procedures. (see, e.g., 40 CFR parts 260–271.)

(e) *Records.* The IHA shall maintain records on which units, common areas, exteriors, and IHA child care facilities have been tested, results of the testing, and the condition of painted surfaces by location in or on the unit, interior common area, exterior surface or IHA child care facility. The IHA shall report information regarding such testing, in accordance with such requirements as shall be prescribed by HUD. The IHA shall also maintain records of abatement provided under this subpart, and shall report information regarding such abatement, and its compliance with the requirements of 24 CFR part 35 and § 905.555, in accordance with such requirements as shall be prescribed by HUD. If records establish that a unit, an IHA child care facility, an exterior or interior common area was tested or treated in accordance with the standards prescribed in this subpart,



that unit, child care facility, exterior or interior common area is not required to be re-tested or re-treated.

(Information collection requirements contained in paragraph (e) were approved by the Office of Management and Budget under control number 2577-0090)

**§ 905.575 Compliance with Tribal, State and local laws.**

(a) *IHA responsibilities.* Nothing in this subpart is intended to relieve an IHA of any responsibility for compliance with Tribal, State or local laws, ordinances, codes or regulations governing lead-based paint testing or hazard abatement. The IHA shall maintain records evidencing compliance with applicable Tribal, State or local requirements, and shall report information concerning such compliance, in accordance with such requirements as shall be prescribed by HUD.

(b) *HUD responsibility.* If HUD determines that a Tribal, State or local law, ordinance, code or regulation provides for lead-based paint testing or hazard abatement in a manner which provides a comparable level of protection from the hazards of lead-based paint poisoning to that provided by the requirements of this subpart and that adherence to the requirements of this subpart would be duplicative or otherwise cause inefficiencies, HUD may modify or waive the requirements of this subpart in such a manner as may be appropriate to promote efficiency while ensuring such comparable level of protection.

(Information collection requirements contained in this section were approved by the Office of Management and Budget under OMB Control Number 2577-0090)

**§ 905.580 Monitoring and enforcement.**

IHA compliance with the requirements of this subpart will be included in the scope of HUD monitoring of IHA operations. Noncompliance with any requirement of this subpart may subject an IHA to sanctions provided under the Annual Contributions Contract or to enforcement by other means authorized by law.

**Subpart I—Modernization**

**General Provisions**

**§ 905.600 Purpose and applicability.**

(a) *Purpose.* Section 14 of the United States Housing Act of 1937 established the Indian Housing Modernization program, authorizing HUD to provide financial assistance to Indian Housing Authorities (IHAs) to improve the physical condition and upgrade the management and operation of existing

Indian housing developments to assure that such developments continue to be available to serve low income families. These physical and management improvements are authorized under sections 5(c) and 14(b)(2) of the Act, pursuant to the funding method prescribed under section 14(k) of the Act. This subpart prescribes the requirements and procedures for the Indian Housing Modernization program.

(b) *Applicability.* (1) The undesignated heading entitled, General Provisions, applies to all modernization under this subpart. The undesignated heading entitled, Comprehensive Improvement Assistance Program (CIAP), sets forth the requirements and procedures for the CIAP for IHAs that own or operate fewer than 500 Indian housing units (fewer than 250 units beginning in FFY 1993). An IHA that qualifies for participation in the CGP is not eligible to participate in the CIAP. The undesignated heading entitled, Comprehensive Grant program (CGP), sets forth the requirements and procedures for the CGP for IHAs that own or operate 500 or more Indian housing units (250 or more units beginning in FFY 1993). For purposes of the 500 or more unit threshold for participation in the CGP (250 or more units beginning in FFY 1993), and for the formula allocation under § 905.601, an existing rental and section 23 bond-financed unit under the ACC shall count as one unit; and a unit under the Turnkey III program shall count as one-fourth of a unit. A unit under the Mutual Help program shall count as one unit. An IHA that has already qualified to participate in the CGP because it owns or operates 500 or more units (250 or more units beginning in FFY 1993), may elect to continue to participate in the CGP so long as it owns or operates at least 200 units.

(2) This subpart applies to IHA-owned low income Indian housing developments (including developments managed by a Resident Management Corporation pursuant to a contract with the IHA), and to section 23 Leased Housing Bond-Financed developments, for which IHAs request assistance under the CIAP or CGP. This subpart also applies to the implementation of modernization programs which were approved before FFY 1992. Rental developments which are planned for conversion to home ownership under sections 5(h), 21, or 301 of the Act, but which have not yet been sold by an IHA, continue to qualify for assistance under this part. This subpart does not apply to developments under the Section 23 Leased Housing Non-Bond Financed program, the section 10(c) Leased

program, or the section 23 or section 8 Housing Assistance Payments programs.

(c) *Transition.* Any amount that HUD has obligated to an IHA under the CIAP program must be used for the purposes for which the funding was provided, or for purposes consistent with an approved action plan submitted by the IHA under the CGP, as the IHA determines to be appropriate.

(d) See subpart A of this part for applicable requirements, other than the Act, that apply to modernization under this subpart.

**§ 905.601 Allocation of funds under section 14.**

(a) *General.* This section describes the process for allocating modernization funds to the aggregate of IHAs and PHAs participating in the CIAP (i.e., agencies that own or operate fewer than 500 units, or fewer than 250 units beginning in FFY 1993), and to individual IHAs and PHAs participating in the CGP (i.e., agencies that own or operate 500 or more units, or 250 or more units beginning in FFY 1993). The program requirements governing PHA participation in the CIAP and CGP are contained in 24 CFR part 968.

(b) *Set-aside for emergencies and disasters for CGP agencies.* For each FFY, HUD shall reserve from amounts approved in the appropriation act for grants under this part, \$75 million (which shall include unused reserve amounts carried over from previous FFYs), which shall be made available to IHAs under the CGP and to PHAs under 24 CFR part 968 (subpart C), for modernization needs resulting from natural and other disasters, and from emergencies. HUD shall replenish this reserve at the beginning of each FFY so that it always begins with a \$75 million balance. Any unused funds from previous years will remain in the reserve until allocated. The requirements governing the reserve for disasters and emergencies, and the procedures by which an IHA may request such funds, are set forth in § 905.667.

(c) *Set-aside for credits for mod troubled PHAs under 24 CFR part 968, subpart C—(1) General.* After deducting amounts for the reserve for natural and other disasters and for emergencies under paragraph (b) of this section, HUD shall set aside no more than five percent of the remaining amount for the purpose of providing credits to PHAs under 24 CFR part 968 (subpart C) that were formerly designated as mod troubled agencies under the Public Housing Management Assessment program ("PHMAP") at 24 CFR part 901. The



purpose of this set-aside is to compensate such PHAs for amounts previously withheld by HUD because of their prior designation as a mod troubled agency.

(2) *Nonapplicability to IHAs.* Since the PHMAP performance indicators under 24 CFR part 901 do not apply to IHAs, these agencies cannot be deemed "mod troubled" for purposes of the CGP. Hence, IHAs are not subject to any reduction in funding under section 14(k)(5)(a) of the Act, nor do they participate in the set-aside of credits established under paragraph (c)(1) of this section.

(d) *Formula allocation based on relative needs.* After determining the amounts to be reserved under paragraphs (b) and (c) of this section, HUD shall allocate the amount remaining pursuant to the formula set forth in paragraphs (e) and (f) of this section, which is designed to measure the relative backlog and accrual needs of IHAs and PHAs.<sup>1</sup>

(e) *Allocation for backlog needs.* HUD shall allocate half of the formula amount under paragraph (d) of this section based on the relative backlog needs of IHAs and PHAs, as follows:

(1) *Determination of backlog need—(i) Statistically reliable data.* Where HUD determines that the data concerning the categories of backlog need identified under paragraph (e)(4) of this section are statistically reliable for individual IHAs and PHAs with 500 or more units (250 or more units beginning in FFY 1993), or the aggregate of IHAs and PHAs with fewer than 500 units (fewer than 250 units beginning in FFY 1993) not participating in the formula funding portion of the modernization program, it will base its allocation on direct estimates of the statutory categories of backlog need, based on the most recently available, statistically reliable data.

(ii) *Statistically reliable data are unavailable.* Where HUD determines that statistically reliable data concerning the categories of backlog need identified under paragraph (e)(4) of this section are not available for individual IHAs and PHAs with 500 or more units (250 or more units beginning in FFY 1993), it will base its allocation of funds under this section on estimates of the categories of backlog need using:

(A) The most recently available data on the categories of backlog need under paragraph (e)(4) of this section;

(B) Objectively measurable data concerning the following IHA or PHA, community and development characteristics:

(1) The average number of bedrooms in the units in a development. (Weighted at 2858.7);

(2) The proportion of units in a development available for occupancy by very large families. (Weighted at 7295.7);

(3) The extent to which units for families are in high-rise elevator developments. (Weighted at 5555.8);

(4) The age of the developments, as determined by the DOFA date (date of full availability). In the case of acquired developments, HUD will use the DOFA date unless the IHA provides HUD with the actual date of construction, in which case HUD will use the age of the development (or, for scattered sites, the average age of all the buildings), subject to a 50 year cap. (Weighted at 206.5);

(5) In the case of a large agency, the number of units with 2 or more bedrooms. (Weighted at .433);

(6) The cost of rehabilitating property in the area. (Weighted at 27544.3);

(7) For family developments, the extent of population decline in the unit of general local government determined on the basis of the 1970 and 1980 censuses. (Weighted at 759.5); and

(C) An equation constant of 1412.9.

(2) *Calibration of backlog need for developments constructed prior to 1985.* The estimated backlog need, as determined under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section, shall be adjusted upward for developments constructed prior to 1985 by a constant ratio of 1.5 to more accurately reflect the costs of modernizing the categories of backlog need under paragraph (e)(4) of this section, for the Indian housing stock as of 1991.

(3) *Deduction for prior modernization.* HUD shall deduct from the estimated backlog need, as determined under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section, amounts previously provided to an IHA or PHA for modernization, using one of the following methods:

(i) *Standard deduction for prior CIAP and MROP.* HUD shall deduct 60 percent of the CIAP funds made available on an IHA-wide or PHA-wide basis from FFY 1984 to 1991, and 40 percent of the funds made available on a development-specific basis for the Major Reconstruction of Obsolete Projects (MROP) (not to exceed the estimated formula need for the development), subject to a maximum fifty percent deduction of an IHA's or PHA's total need for backlog funding;

(ii) *Newly constructed units.* Units with a DOFA date of October 1, 1991 or thereafter will be considered to have a zero backlog; or

(iii) *Acquired developments.*

Developments acquired by an IHA with major rehabilitation, with a DOFA date of October 1, 1991 or thereafter will be considered to have a zero backlog.

(4) *Categories of backlog need.* The most recently available data to be used under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section must pertain to the following categories of backlog need:

(i) Backlog of needed repairs and replacements of existing physical systems in Indian housing developments;

(ii) Items that must be added to developments to meet HUD's modernization standards under § 905.603, and State, local and Tribal codes; and

(iii) Items that are necessary or highly desirable for the long-term viability of a development, in accordance with HUD's modernization standards.

(f) *Allocation for accrual needs.* HUD shall allocate the other half remaining under the formula allocation under paragraph (d) of this section based upon the relative accrual needs of IHAs and PHAs, determined as follows:

(1) *Statistically reliable data.* Where HUD determines that statistically reliable data are available concerning the categories of need identified under paragraph (f)(3) of this section for individual IHAs and PHAs with 500 or more units (250 or more units beginning in FFY 1993), and for the aggregate of IHAs and PHAs with fewer than 500 units (fewer than 250 units beginning in FFY 1993), it shall base its allocation of assistance under this section on the needs that are estimated to have accrued since the date of the last objective measurement of backlog needs under paragraph (e)(1)(i) of this section; or

(2) *Statistically reliable data are unavailable.* Where HUD determines that statistically reliable data concerning the categories of need identified under paragraph (f)(3) of this section are not available for individual IHAs and PHAs with 500 or more units (250 or more units beginning in FFY 1993), it shall base its allocation of assistance under this section on estimates of accrued need using:

(i) The most recently available data on the categories of backlog need under paragraph (f)(3) of this section;

(ii) Objectively measurable data concerning the following IHA or PHA, community, and development characteristics:

<sup>1</sup> In construing all terms used in the statutory indicators for estimating backlog and accrual need, HUD shall use the meanings cited in appendix B of the HUD Report to the Congress on Alternative Methods for Funding Public Housing Modernization (April 1990).



(A) The average number of bedrooms in the units in a development. (Weighted at 100.1);

(B) The proportion of units in a development available for occupancy by very large families. (Weighted at 356.7);

(C) The age of the developments. (Weighted at 10.4);

(D) The extent to which the buildings in developments of an agency average fewer than 5 units. (Weighted at 87.1);

(E) The cost of rehabilitating property in the area. (Weighted at 679.1);

(F) The total number of units of each IHA or PHA that owns or operates 500 or more units (250 or more units beginning in FFY 1993). (Weighted at .0144); and

(iii) An equation constant of 602.1.

(3) *Categories of need.* The data to be provided under either paragraph (f)(1) or (f)(2) of this section must pertain to the following categories of need:

(i) Backlog of needed repairs and replacements of existing physical systems in Indian housing developments; and

(ii) Items that must be added to developments to meet HUD's modernization standards under § 905.603, and State, local and Tribal codes.

(g) *Allocation for CIAP.* The formula amount determined under paragraphs (e) and (f) of this section for IHAs and PHAs with fewer than 500 units (fewer than 250 units beginning in FFY 1993) shall be allocated to IHAs in accordance with the requirements of the undesignated heading under this subpart entitled, "Comprehensive Improvement Assistance Program," (CIAP) and to PHAs in accordance with the requirements of 24 CFR part 968 (subpart B).

(h) *Allocation for CGP.* The formula amount determined under paragraphs (e) and (f) of this section for IHAs with 500 or more units (250 or more units beginning in FFY 1993) shall be allocated in accordance with the requirements of the undesignated heading under this subpart entitled, "Comprehensive Grant Program," and for PHAs in accordance with the requirements of 24 CFR part 968 (subpart C). An IHA that is eligible to receive a grant under the CGP may appeal the amount of its formula allocation under this section in accordance with the requirements set forth in § 905.669(b)(2). An IHA which is eligible to receive modernization funds under the CGP because it owns or operates 500 or more units (250 or more units beginning in FFY 1993), is disqualified from receiving assistance under the CIAP under this part.

(i) *Use of formula allocation.* Any amounts allocated to an IHA under paragraphs (e) and (f) of this section may be used for any eligible activity under this subpart, notwithstanding that the allocation amount is determined by allocating half based on the relative backlog needs and half based on the relative accrual needs of IHAs and PHAs.

(j) *Calculation of number of units.* For purposes of determining under this section the number of units owned or operated by an IHA or PHA, and the relative modernization needs of IHAs and PHAs, HUD shall count as one unit each existing rental and section 23 Bond-Financed unit under the ACC, except that it shall count as one-fourth of a unit each existing unit under the Turnkey III program. In addition, HUD shall count as one unit each existing unit under the Mutual Help program, except that once the unit has been funded for substantial rehabilitation under the CGP, it will be phased out over a period of three years for purposes of the threshold for participation in the CGP and for the formula.

(k) *Demolition, disposition and conversion of units—(1) General.* Where an existing unit under an ACC is demolished, disposed of, or converted into a larger or smaller unit, including the substantial rehabilitation of a Mutual Help unit, HUD shall not adjust the amount the IHA or PHA receives under the formula, unless more than one percent of the units are affected on a cumulative basis. Where more than one percent of the existing units are demolished, disposed of, or converted, HUD shall reduce the formula amount for the IHA or PHA over a 3-year period to reflect removal of the units from the ACC.

(2) *Determination of one percent cap.* In determining whether more than one percent of the units are affected on a cumulative basis, HUD will compare the units eligible for funding in the initial year under formula funding with the number of units eligible for funding for formula funding purposes for the current year, and shall base its calculations on the following:

(i) New units which are added to an IHA's or PHA's inventory (or increases resulting from the conversion of existing units) will be added to the overall unit count so long as they are covered by an ACC amendment as of the first day of the FFY in which the formula is being run. Any increase in ACC units as of the beginning of the FFY, including increases as a result of conversion, shall result in an adjustment upwards in the number of units under the formula. New units added to the ACC after this date

will be counted for formula purposes as of the following FFY;

(ii) Units which are lost as a result of demolition, disposition or conversion shall not be offset against units subsequently added to an IHA's or PHA's inventory;

(iii) For purposes of calculating the number of converted units, HUD shall regard the converted size of the unit as the appropriate unit count (e.g., a unit that originally was counted as one unit under paragraph (j) of this section, but which later was converted into two units, shall be counted as two units under the ACC).

(3) *Phased-in reduction of units—(i) Reduction less than one percent.* If HUD determines that the reduction in units under paragraph (k)(2) of this section is less than one percent, the IHA or PHA will be funded as though no change had occurred.

(ii) *Reduction greater than one percent.* If HUD determines that the reduction in units under paragraph (k)(2) of this section is greater than one percent, the number of units on which formula funding is based will be the number of units reported as eligible for funding for the current program, plus two thirds of the difference between the initial year and the current year in the first year, plus one third of the difference in the second year, and at the level of the current year in the third year.

(iii) *Exception.* A unit that is conveyed under the Mutual Help or Turnkey III programs will result in an automatic (rather than a phased-in) reduction in the unit count.

(4) *Subsequent reductions in unit count.* (i) Once an IHA's or PHA's unit count has been fully reduced under paragraph (k)(3)(ii) of this section to reflect the new number of units under the ACC, this new number of units will serve as the base for purposes of calculating whether there has been a one-percent reduction in units on a cumulative basis.

(ii) A reduction in formula funding, based upon additional reductions to the number of an IHA's or PHA's units, will also be phased in over a three-year period, as described in paragraph (k)(2) of this section.

#### § 905.602 Special requirements for Turnkey III and Mutual Help developments.

(a) Promptly after HUD approval of the application, each homebuyer family shall execute an amendment to its Homebuyer Agreement, reflecting an increase in the purchase price of its home and an extension of the amortization period in accordance with



paragraphs (b) and (c) of this section, except for:

(1) Eligible homeownership costs, as set forth in §§ 905.615(f)(1) and 905.666(d)(1);

(2) Comprehensive modernization of a Mutual Help unit pursuant to § 905.615(f)(2), or the substantial rehabilitation of a Mutual Help unit pursuant to § 905.666(b)(2);

(3) Special purpose modernization of a vacant or non-homebuyer occupied Turnkey III unit pursuant to § 905.615(f)(3), or the substantial rehabilitation of a vacant or non-homebuyer occupied Turnkey III unit pursuant to § 905.666(b)(3).

(b) For Turnkey III developments that have purchase price schedules and for Mutual Help developments placed under ACC on or after March 9, 1976:

(1) The amount of modernization cost attributable to the home, as shown in the HUD-approved application, shall be added to the homebuyer's purchase price as initially determined for Turnkey III or Mutual Help developments.

(2) The period of the homebuyer's current purchase price schedule shall be extended by the same percentage as the percentage of increase in the homebuyer's purchase price. The new purchase price schedule shall:

(i) Show monthly amortization of the new purchase price over a period commencing on the same day as the original purchase price schedule and terminating at the end of the extended period; and

(ii) Be computed on the basis of the same interest rate as used for the current purchase price schedule. (For Mutual Help grant funding, no interest rate is used when computing the new purchase price schedule.)

(3) If a modernization program is approved for a development after one or more earlier modernization programs for the same development, the total amount of modernization cost attributable to the home under the prior modernization program(s) shall be included as part of the homebuyer's initial purchase price in applying the provisions of paragraphs (b)(1) and (b)(2) of this section.

(c) For Turnkey III developments that do not have purchase price schedules and Mutual Help developments placed under ACC before March 9, 1976 and not converted:

(1) These developments do not involve purchase price schedules for amortization of the homebuyer's purchase price over a fixed period of time because the homebuyer's purchase price in these developments is based on the unamortized balance of the portion

of the development debt attributable to the home. Consequently, it is necessary to establish a separate schedule for the amortization of the estimated modernization cost attributable to the home, as shown by the HUD-approved application.

(2) The IHA shall furnish to the homebuyer a schedule showing monthly amortization of the modernization cost attributable to the home, at the minimum loan interest rate specified in the ACC for the modernization project, over a period commencing on the first day of the month after the date of original occupancy of the home by the homebuyer and terminating at the end of the period determined as follows:

(i) Divide the amount of the modernization cost attributable to the home (including the total amount of modernization cost attributable to the home under prior modernization programs, if any) by the amount of the current HUD-approved estimated replacement cost of the home.

(ii) Multiply this amount by 25, round the result to the next higher number, and add that number to 25. This is the number of years to be used as the period for the modernization amortization schedule.

(iii) The purchase price for the unit shall be the sum of (A) the balance of the debt attributable to the home and (B) the amount remaining on the modernization schedule at the time of settlement.

(d) In order to participate, the homebuyer must be in compliance with its financial obligations under its homebuyer agreement.

(e) Modernization work on any Mutual Help or Turnkey III units that have been paid off, even though not conveyed, by the time the CIAP application or CGP annual statement is submitted is ineligible. However, modernization work on any Mutual Help or Turnkey III units that have not been paid off at the time the CIAP application or the CGP annual statement is submitted and that is included in the annual statement is eligible even where the units are subsequently paid off before the work is completed.

#### § 905.603 Modernization and energy conservation standards.

(a) All improvements funded under this subpart, which may include alterations, betterments, additions, replacements or non-routine maintenance, shall meet the HUD modernization standards, described in paragraph (b) of this section and to comply with lead-based paint testing and abatement requirements in subpart

H of this chapter and established to provide decent, safe, and sanitary living conditions in IHA-owned and IHA-operated housing. All improvements funded under this part shall meet the HUD-energy conservation standards for cost-effective energy conservation measures in such developments, described in paragraphs (c) and (d) of this section.

(b) The modernization standards are comprised of both mandatory and development-specific standards. The mandatory standards are intended to provide decent, safe, and sanitary living conditions in Indian housing, including corrections of violations of basic health and safety codes, and to address all deficiencies, including those related to deferred maintenance. The development-specific standards permit an IHA to undertake improvements that are necessary or highly desirable for the long-term physical and social viability of a development, which includes site and building security. The modernization standards are contained in HUD Handbook 7485.2, as revised, Public and Indian Housing Modernization Standards, and in other documents cited in the Handbook. Copies may be obtained by writing to the HUD Regional Office of Indian Programs within the applicant's jurisdiction.

(c) The energy conservation standards are standards for the installation of cost-effective energy conserving improvements, including solar energy systems. The energy conservation standards provide for the conducting or updating of energy audits, including cost-benefit analyses of energy saving opportunities, in order to determine which measures will be cost effective in conserving energy. The energy conservation standards are contained in the HUD Workbook, Energy conservation for Housing, and in other documents cited in the Workbook.

(d) Life-cycle cost-effective energy performance standards established by HUD to reduce the operating costs of Indian housing developments over the estimated life of the buildings shall apply to developments modernized under this subpart. These standards are contained in HUD Handbook 7418.1, as revised, Life-Cycle Cost Analysis for Utility Combinations.

(Information collection requirements have been approved by the Office of Management and Budget under control number 2577-0024)



**Comprehensive Improvement Assistance Program (For IHAs That Own or Operate Fewer than 500 Indian Housing Units) (Fewer than 250 units Beginning in FFY 1993)**

**§ 905.609 Purpose.**

The purpose of the undesignated heading entitled Comprehensive Improvement Assistance Program (CIAP), is to set forth the policies and procedures for the CIAP under which IHAs that own or operate fewer than a total of 500 units of Indian housing (fewer than 250 units beginning in FFY 1993) may receive financial assistance for the modernization of Indian housing developments, including comprehensive, emergency, lead-based paint, homeownership, and special purpose modernization. Funding for this program is provided under section 5(c) of the Act, pursuant to section 14(k) of the Act (see § 905.601 for the formula allocation process for the aggregate of CIAP agencies under this subpart).

**§ 905.615 Eligible costs.**

(a) *Physical improvements.* Physical improvements eligible for modernization funding include alterations, betterments, additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 905.603. These standards may be exceeded only when necessary or highly desirable for the long-term physical and social viability of the individual development. If demolition is proposed, the IHA shall comply with subpart M.

(b) *Management improvement costs—(1) Eligibility.* Management improvements that are development-specific or IHA-wide in nature are eligible costs only under special purpose management modernization under paragraph (b)(3) of this section, or comprehensive modernization, subject to all of the following conditions:

(i) The management improvements are necessary to correct identified management problems and to sustain the physical improvements at the development to be modernized comprehensively, or pursuant to special purpose modernization, as set forth in this section;

(ii) The management improvements require additional funds for implementation and the funds are not available from other sources;

(iii) The combined costs for management improvements and planning under paragraph (d) of this section do not exceed 10 percent of the total estimated physical improvement costs for a multi-stage project (from all FFYs), unless specifically approved by

HUD. Under paragraph (d) of this section, planning costs shall not exceed five percent of the funds available to the HUD office in a particular FFY;

(iv) Management improvement costs are funded only for the implementation period of the physical improvements. In rare cases, the HUD office may approve a longer period, up to a maximum of five years, where it is clearly shown to be necessary to complete the initial installation and demonstrate that the management work item will bring about needed management improvements; and

(v) Where an approved modernization program includes management improvements that involve ongoing costs, HUD is not obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. The IHA is responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

(2) *Eligible management areas.* Subject to the conditions set forth in paragraph (b)(1) of this section, management improvements may involve or upgrade the following areas:

(i) Management, financial and accounting control systems of the IHA;

(ii) Adequacy and qualifications of personnel employed by the IHA in its management and operation, for each significant category of employment;

(iii) Adequacy and efficacy of the following for the development to be modernized:

(A) Resident programs and services, including certain drug elimination activities;

(B) Resident and development security;

(C) Resident selection and eviction;

(D) Occupancy;

(E) Rent collection;

(F) Maintenance; and

(G) Equal opportunity; and

(iv) Resident management corporations under paragraph (i) of this section.

(3) *Special purpose management modernization.* Special purpose management improvements are eligible modernization costs under the category of special purpose modernization, if they address needs which are not otherwise eligible for assistance under paragraph (b)(1) of this section.

(c) *Relocation and moving costs—(1) Temporary relocation.* The following policies cover residential residents who are moved temporarily due to rehabilitation or demolition of a development assisted under this subpart, but are offered the opportunity to return to the same development at the

same site, although not necessarily the same unit or building in the development. The IHA shall provide such residents:

(i) All actual reasonable moving and related costs incurred in connection with the temporary relocation, by either undertaking the move itself or reimbursing for such costs; and

(ii) Appropriate advisory services, including reasonable advance written notice of: the date and approximate duration of the temporary relocation; the suitable, decent, safe, and sanitary temporary housing that will be made available; and the provisions of paragraph (c)(1)(i) of this section.

(2) *Relocation assistance for displaced persons.* An IHA must provide relocation assistance to displaced persons, as defined in paragraph (c)(6)(i) of this section, at the levels described in, and in accordance with, the provisions of 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. 4601.

(3) *Real property acquisition requirements.* The acquisition of real property for a development by an IHA is subject to the URA and the requirements described in 49 CFR part 24, subpart B, whether it is organized pursuant to State law or Tribal law.

(4) *Responsibility of the IHA.* The IHA shall certify compliance with URA and 49 CFR part 24 and with the requirements of this section. This certification shall be included in the agreement between HUD and the IHA. The cost of assistance required by this section may be paid from local public funds or Tribal funds, funds provided in accordance with this subpart, or funds available from other sources.

(5) *Appeals.* A person who disagrees with the IHA's determination concerning a payment or other assistance required by this section may file a written appeal of that determination with the IHA. The appeal procedures to be followed are described in 49 CFR 24.10.

(6) *Definition of displaced person.* (i) The term *displaced person* means a person (family, individual, business, nonprofit organization, or farm) that moves from real property, or moves personal property from real property, permanently and involuntarily, as a direct result of acquisition, rehabilitation, or demolition for a development assisted under this subpart. Permanent, involuntary moves for an assisted development include:

(A) A permanent move from the real property (development/site) following notice by the IHA to move permanently from the property, if the move takes



place on or after the date that HUD approves the IHA's application for assistance;

(B) A permanent move from the real property that occurs before HUD's approval of the IHA's application, if the IHA or HUD determines that the displacement resulted directly from acquisition, rehabilitation or demolition for a development;

(C) A permanent move from the real property by a resident of a dwelling unit that occurs after the execution of the ACC between the IHA and HUD if:

(1) The resident has not been provided a reasonable opportunity to lease and occupy a suitable, decent, safe and sanitary dwelling in the same development/site following the completion of the development at a rent, including estimated average utility costs, that does not exceed the greater of the resident's rent and estimated average utility costs before the initiation of negotiations (as defined in 49 CFR 24.2(k)), or 30 percent of gross household income; or

(2) the resident has been required to relocate temporarily as described in paragraph (c)(1) of this section, but the resident is not offered payment for all actual reasonable moving and related expenses incurred in connection with the temporary relocation or other conditions of the temporary relocation are not reasonable; or

(3) the resident is required to move to another unit in the same development/site, but is not offered reimbursement for all moving and related expenses incurred in connection with the move.

(ii) A person shall not qualify as a displaced person, if:

(A) The person has been evicted for cause based upon a serious or repeated violation of material terms of the lease or occupancy agreement and the IHA determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance;

(B) The person moved into the property after HUD approval of the application and, before commencing occupancy, received written notice of the expected displacement;

(C) The person is ineligible under 49 CFR 24.2(g)(2); or

(D) The IHA determines and HUD concurs that the person was not displaced as a direct result of acquisition, rehabilitation, or demolition for the development.

(iii) The IHA may, at any time, request a HUD determination as to whether a displacement is or would be covered by 49 CFR part 24.

(d) *Planning costs.* Planning costs necessary for developing the application

(i.e., costs incurred before modernization program approval) are eligible modernization costs. These costs may be reimbursed after application approval. Financially distressed IHAs may request approval from HUD for up-front funding of planning costs where the HUD office determines that developing the application would otherwise present an undue financial hardship. For this purpose, a financially distressed IHA is an IHA that has an operating reserve level of 20 percent or less of its authorized maximum or other level as determined by HUD, as shown on the latest year-end financial statement. Not more than five percent of the funds available to the HUD office in a particular FFY shall be used for planning costs.

(e) *Administrative costs.* Administrative costs necessary for the additional design and implementation of the physical and management improvements (i.e., costs to be incurred after modernization program approval) are eligible modernization costs, as follows:

(1) *Nontechnical and technical salaries.* The salaries of nontechnical and technical IHA personnel assigned full-time or part-time to the modernization program are eligible modernization costs. Any proration of salaries shall be justified by the IHA, authorized by the HUD office, and reflected by an appropriate revision to the IHA's operating budget.

(2) *Employee benefit contributions.* IHA contributions to employee benefit plans on behalf of nontechnical and technical IHA personnel are eligible modernization costs in proportion to the amount of salary charged to the modernization program.

(f) *Turnkey III and Mutual Help developments—(1) General.* Eligible physical improvement costs for existing Turnkey III and Mutual Help developments are limited to work items which are not the responsibility of the homebuyer families, and which are related to health and safety, correction of development deficiencies, physical accessibility, energy audits and cost-effective energy conservation measures, and lead-based paint testing and abatement. Nonroutine maintenance or replacements, additions, and items that are the responsibility of the homebuyer families are ineligible modernization costs for homeownership developments. Management improvements are eligible modernization costs for homeownership developments under special purpose modernization, in accordance with § 905.615(b)(3). Costs of health and safety work items shall increase the

purchase price and amortization period for homebuyer families; other eligible costs shall not increase the purchase price and amortization period.

(2) *Exception for Mutual Help units.* Notwithstanding the requirements of paragraph (f)(1) of this section, an IHA may use no more than a single CIAP grant under this subpart for purposes of comprehensively modernizing a Mutual Help unit which is at least 10 years old, and which the IHA has identified in its CIAP application.

(3) *Exception for vacant or non-homebuyer-occupied Turnkey III units.* Notwithstanding the requirements of paragraph (f)(1) of this section, an IHA may carry out special purpose modernization in a Turnkey III development whenever a Turnkey III unit becomes vacant or is occupied by a non-homebuyer family. An IHA that intends to use funds under this paragraph must identify in its application the estimated number of units that the IHA is proposing for special purpose modernization and subsequent sale. In addition, the IHA must demonstrate in its application that: the proposed modernization under this paragraph would result in bringing the identified units into full compliance with the homeownership objectives under the Turnkey III program (see subpart G of this part); and the IHA has homebuyers who are both eligible for homeownership, in accordance with the requirements of this part, and who have demonstrated their intent to be placed into each of the Turnkey III units proposed for special purpose modernization. Before an IHA may be approved for the special purpose modernization of a unit under this paragraph, it must first deplete any Earned Home Payments Account (EHPA), or Non-Routine Maintenance Reserve (NRM) pertaining to the unit, and request the maximum operating subsidy. Any increase in the value of a unit caused by its special purpose modernization under this paragraph shall be reflected solely by its subsequent appraised value and not by an automatic increase in its selling price.

(g) *Resident management corporations.* Eligible modernization costs include use of management improvement funds to assist a resident management corporation, as defined in § 905.355, to develop its management capabilities and carry out management improvements identified as IHA-wide or development-specific in nature, under the terms of a management contract between the IHA and the resident management corporation. Such funding



is subject to the limitations indicated in paragraph (b) of this section.

**§ 905.618 Procedures for obtaining approval of a modernization program.**

(a) *HUD notification.* As soon as possible after modernization funds for a particular FFY become available, HUD shall give written notification of the availability of such funds and the time frame for submission of the application.

(b) *IHA consultation with local officials and residents/homebuyers.* The IHA shall develop the application in consultation with local officials and residents/homebuyers at the development to be modernized, as set forth in § 905.624 and § 905.627. Before developing the application, the IHA shall consult with local officials as to whether the proposed comprehensive, special purpose, or homeownership modernization is financially feasible and will result in long-term physical and social viability of the development.

(c) *Application.* The IHA shall submit to HUD an application, in a form prescribed by HUD, which shall include, but not be limited to the following:

(1) A five-year funding request plan, which includes the IHA's estimate of the comprehensive modernization funds to be requested over a five-year period to meet the total physical and management improvement needs of its developments sufficient to meet the modernization and energy conservation standards in § 905.603, including any special purpose and homeownership needs, as well as any emergency needs in the current FFY.

(2) A preliminary assessment of the total physical and management needs of each development for which the IHA is requesting comprehensive modernization and of the specialized needs of each development for which the IHA is requesting special purpose, emergency or homeownership modernization funds in the current FFY.

(3) For each development proposed for comprehensive modernization in the current FFY, an identification of and an estimate of the total costs of replacement of the equipment, systems, or structural elements that would normally be replaced (assuming routine and timely maintenance is performed) over the remaining period of the ACC or during the 30-year period beginning on the date of submission of the application, whichever period is longer.

(4) A resolution by the IHA Board of Commissioners, approving the application and containing certifications as required by HUD.

(5) Other data related to the operation of the program, as may be required to comply with other Federal laws and regulations.

(d) *HUD screening and review.* (1) The HUD office shall screen and review the applications, and select applications for further processing, on the basis of such factors as the extent and urgency of the need and the IHA's management and modernization capability. Management capability will be deemed to be adequate unless, in accordance with § 905.135, HUD has determined that management practices are inadequate. Among the IHA practices considered for this determination are the management, financial, and accounting controls; resident programs and services; resident and development security; resident selection and eviction; occupancy; and maintenance. Modernization capability is adequate if the IHA obligates approved modernization funds within the HUD-approved schedule, except in circumstances beyond the IHA's control, and the IHA's expenditure of modernization funds assures the long-term social and physical viability of the modernized units. Funds are considered obligated when the IHA awards a contract or starts force account work for the modernization project.

Circumstances beyond the IHA's control may be found by the HUD office in such cases as delays resulting from litigation, environmental review or strikes.

(e) *IHA preparation for joint review.* The IHA shall prepare for the joint review by:

(1) Reaching agreement with the HUD office on the specific development(s) to be covered during the joint review;

(2) Completing an assessment of the needs of each development for which the IHA is requesting funds in the current FFY. The IHA will complete a detailed, comprehensive assessment, in a form prescribed by HUD, of the total physical and management needs of each development for which the IHA is requesting comprehensive or special purpose modernization; except that if the request for a particular development is limited to physical improvements to increase accessibility for elderly and handicapped families and to increase energy efficiency, a specialized assessment will be completed unless HUD determines that there is evidence indicating that the development has major problems that justify a comprehensive assessment. An assessment of specialized physical improvement needs will be completed for each development for which the IHA is requesting emergency or homeownership modernization;

(3) Reviewing the other factors to be covered during the joint review as prescribed by HUD.

(f) *Joint review.* If determined by HUD to be necessary, the IHA and the HUD

office may conduct a joint review to discuss the proposed modernization program, as set forth in the application, and reach tentative agreement on the IHA needs. The joint review may include an on-site inspection of the property and resolution of the relevant issues as prescribed by HUD.

(g) *Comprehensive modernization approach.* HUD will fund proposed comprehensive modernization in one stage, or, on an exception basis, in more than one stage, subject to future fund availability. Grounds for exception include an IHA's lack of management capability, as determined in accordance with § 905.135, or lack of modernization capability, as described in paragraph (d) of this section (which necessitates multi-stage funding).

(1) *One-stage funding.* Under one-stage funding, the total amount of modernization funds for all required physical and management improvements at the development shall be approved at one time, out of funds for a single FFY, under one application.

(2) *Multi-stage funding.* Under multi-stage funding, the total amount of the modernization funds for all required physical and management improvements at the development shall be approved in the fewest number of stages that are feasible, over several different FFYs. The first stage will include funds for architectural/engineering work and/or a portion of the physical improvements. Management improvements may be included in the first stage to the extent they are eligible costs under § 905.615(b).

(i) *First stage.* At the first stage of funding, the application shall include a comprehensive assessment of the development's physical and management improvement needs and a plan under paragraph (i)(2) of this section addressing only the work items to be completed during this stage. When approving the first stage, the HUD field office will indicate the approximate balance of the funds required to complete the comprehensive modernization, but also will indicate that future funding will be subject to all of the following conditions: the availability of funds, satisfactory progress by the IHA in obligating first stage and subsequent stage funds, IHA submission of additional documents, and IHA compliance with HUD regulatory and statutory requirements.

(ii) *Subsequent stages.* Where the IHA is requesting funds for a subsequent stage of a multi-stage comprehensive modernization, the HUD office will determine whether the IHA has made satisfactory progress in obligating prior



stage funds, whether it has submitted necessary additional documents, and whether it has complied with HUD regulatory and statutory requirements. If the IHA has not satisfied these conditions, the HUD office will not approve that subsequent stage of funding at this time. The IHA submission for any subsequent stage should not duplicate items previously submitted.

(3) *Implementation.* After the application for each stage is approved, the IHA and the HUD office shall agree on an implementation period that is appropriate for that funding stage, not to exceed five years for any stage from the date on which that stage is first funded.

(h) *HUD funding decisions.* After all of the joint reviews, the HUD office will determine whether the IHA will be approved for funding and whether any further modifications to the application are required, including IHA submission of the budget. HUD will give preference to IHAs that request assistance for:

(1) Group 1, developments having emergency conditions that pose an immediate threat (*i.e.*, must be corrected within one year of funding approval) to resident life, health, or safety, or are related to fire safety. Funding is limited to correction of emergency conditions and may not be used for substantial rehabilitation.

(2) Group 2, developments:

(i) Having conditions that threaten resident life, health, or safety or having a significant number (10 percent or more) of vacant or substandard units; and

(ii) Located in IHAs having demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose, and homeownership modernization); and

(iii) Within this group, the Secretary may give priority to additional factors, such as whether the development is at the second or subsequent stage of comprehensive modernization, and the cost benefit.

(3) Group 3, other developments located in IHAs that have demonstrated a capability of carrying out the proposed modernization activities (comprehensive, special purpose, and homeownership modernization). The Secretary may give priority to factors which demonstrate that the modernization will result in the greatest cost benefit.

(4) HUD may set aside for special purpose modernization a portion of the total modernization funds available for any FFY, as determined by HUD to be necessary to assure that special purpose needs are appropriately addressed.

(i) *ACC amendment.* After HUD approval of the application, HUD and the IHA shall enter into an ACC amendment for modernization funds.

(j) *Implementation schedule.* After HUD executes the ACC, the IHA shall submit for HUD approval an implementation schedule for each development in the approved modernization program.

#### § 905.621 Modernization project.

(a) *Modernization projects.* For purposes of funding modernization, each modernization program approved for an IHA shall be treated as a separate modernization project. The modernization project may include improvements to one or more developments. Improvements to a single development may be included in more than one modernization project.

(b) *ACC.* HUD and the IHA shall enter into an ACC amendment for each modernization project. The ACC amendment shall require low income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

(c) *Declaration of trust.* The IHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interests of HUD throughout the 20-year period during which the IHA is obligated to operate the individual developments receiving modernization grant funds in accordance with the ACC, the Act, and HUD regulations and requirements.

(d) *Other program requirements.* The IHA shall comply with 24 CFR part 85, except as modified by § 905.639, and with other program requirements, as enumerated in § 905.120. In addition, in accordance with the ACC, the IHA shall carry insurance, as prescribed by HUD, to cover the additional exposures created by the modernization activities and to reflect the increased value of the buildings after modernization.

#### § 905.624 Resident participation.

For a rental development only, before submission of the application, the IHA shall consult with the residents (including, for purposes of this section, resident organizations and resident management corporations, if any) regarding its intent to submit an application for modernization funds. Before the joint review, the IHA shall notify the residents of the development to be modernized of the proposed modernization program, give residents a reasonable opportunity to present their views on the proposed program and alternatives to it, and give full and

serious consideration to resident recommendations. At the Joint Review, or upon request, the IHA shall provide the residents and HUD with a copy of, and an evaluation of, resident recommendations, indicating the reasons for IHA acceptance or rejection, consistent with HUD requirements and the IHA's own determination of efficiency, economy, and need. After HUD approval of the modernization program, the IHA shall inform the residents of the approved work items. The provisions of this section do not apply to proposed work items of an emergency nature, affecting the life, health, and safety of residents, which are processed in a "fast track" mode outside the normal processing schedule. However, the IHA shall inform residents of approved emergency work items.

(Approved by the Office of Management and Budget under control number 2577-0048)

#### § 905.627 Homebuyer participation.

(a) For a homeownership development only, before the joint review (if one is held), the IHA shall discuss the modernization program with the homebuyer families of the development to be modernized and advise them of the effect of the modernization on the terms of the homebuyer agreements. The IHA shall afford the homebuyer families a reasonable opportunity to present their views on the proposed program and give full and serious consideration to their recommendations, consistent with HUD requirements and the IHA's own determination of efficiency, economy, and need.

(b) The IHA shall inform each homebuyer family that:

(1) It will have an opportunity to express its views and preferences with respect to the modernization of its home;

(2) The purchase price and the amortization period will be increased as provided in § 906.802;

(3) It will have an opportunity to participate in the final inspection of the work to determine completion in accordance with the requirements; and

(4) Participation in the program is optional.

(c) The IHA shall provide each homebuyer family with a copy of the IHA's evaluation of its recommendations, the tentative decisions reached on the modernization program to be submitted to the HUD office, the estimated cost of the proposed modernization program, and the amount of the cost to be attributed to its home.

(d) If the homebuyer family decides to participate in the modernization program with respect to any of the



proposed work items, it must agree in writing that its homebuyer agreement will be amended upon approval of the application to provide that, as a result of the amount of modernization cost attributed to its home, the purchase price and the amortization period will be increased as provided in § 905.602.

(e) Any homebuyer family may decline to participate without risk to the homebuyer status.

(f) Before HUD approval of the application, the IHA shall obtain a signed agreement from each participating homebuyer family that it will amend its homebuyer agreement upon approval of the application. The IHA shall retain copies of the signed agreements in its files for inspection by the HUD office.

(g) The provisions of paragraphs (b) through (f) of this section apply only where modernization work relates to health and safety items.

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**§ 905.633 Special requirements for Section 23 Leased Housing Bond-Financed developments.**

(a) A section 23 Leased Housing Bond-Financed development is eligible for modernization only if HUD determines that the development has met the following conditions:

(1) The development was financed by the issuance of bonds;

(2) Clear title to the development will be conveyed to or vested in the IHA at the end of the Section 23 lease term;

(3) There are no legal obstacles affecting the IHA's use of the property as Indian housing during the 20-year period of the modernization;

(4) After completion of the modernization, the development will have a remaining useful life of at least 20 years and it is in the financial interest of the Federal Government to improve the development; and

(5) The development is covered by a cooperation agreement between the IHA and local governing body during the 20-year period of the modernization.

(b) A Section 23 Leased Housing Bond-Financed development that has been conveyed to the IHA after bonds have been retired is similarly eligible for modernization if the conditions specified under paragraph (a) have been satisfied.

**§ 905.636 Additional limitations for special purpose modernization.**

(a) For each of the three types of special purpose modernization relating to major equipment systems or structural elements, security, and reduction of vacant, substandard units, an IHA may obtain special purpose

modernization funding only once for a development that has not been comprehensively modernized, except as provided in § 905.615(f)(2) for the special purpose modernization of vacant or non-homebuyer occupied Turnkey III units. Subsequent funding for the same development for any additional physical improvements of these types may be provided only as a part of a program that addresses all of the physical and management improvement needs of the development under a comprehensive modernization program. This limitation does not apply to a development that has been comprehensively modernized.

(b) Special purpose modernization to reduce the number of vacant, substandard units will be limited to physical improvements that are necessary to meet local code requirements and return such units to a condition that is comparable to the condition of occupied units in the same development, except as provided in § 905.615(f)(3).

**§ 905.639 Contracting requirements.**

(a) *Compliance with State, Tribal and local law and Federal requirements.* The IHA shall comply with State, Tribal and local laws and Federal requirements applicable to bidding and contract awards.

(b) *IHA agreement with architect/engineer.* The IHA shall obtain architectural/engineering services through the competitive proposal process, as described in § 905.175(d). Notwithstanding 24 CFR 85.36(g), the IHA shall comply with HUD requirements either to

(1) Submit the contract for prior HUD approval before execution, or

(2) Certify that the scope of work is consistent with any agreements reached with HUD, and that the fee is appropriate and does not exceed the HUD-approved budget amount.

(c) *Sealed bid (formal advertising) requirements.* For each construction or equipment contract over \$25,000, and lead-based paint testing services over \$25,000, the IHA shall conduct formal advertising as provided in § 905.175(c).

(d) *Assurance of completion.* For each construction or equipment contract over \$25,000, the contractors shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h), subpart B of this part, and as may be required by law, one of the following:

(1) Separate performance and payment bonds, each for 50 percent or more of the contract price;

(2) A 20 percent cash escrow; or

(3) A 25 percent letter of credit.

(e) *Construction and bid documents.* Notwithstanding 24 CFR 85.36(g) and subpart B of this part, the IHA shall comply with HUD requirements either to

(1) Submit complete construction and bid documents for prior HUD approval before inviting bids, or

(2) Certify to receipt of the required architect's/engineer's certification that the construction documents accurately reflect HUD-approved work and that the bid documents are complete and include all mandatory items.

(f) *Contract award.* The IHA shall obtain HUD approval of the proposed award of modernization construction and equipment contracts if the bid amount exceeds the HUD-approved budget amount or if the procurement meets the criteria set forth in § 85.36(g)(2) (i) through (iv). In all other instances, the IHA shall make the award without HUD approval after the IHA has certified that:

(1) The bidding procedures and award were conducted in compliance with State, Tribal or local laws and Federal requirements;

(2) The award does not exceed the approved budget amount and does not meet the criteria in § 85.36(g)(2) (i) through (iv) for prior HUD approval; and

(3) HUD clearance has been obtained for the award under previous participation procedures, including absence of the contractor from the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(g) *Contract modifications.* Notwithstanding 24 CFR 85.36, except in an emergency endangering life or property, the IHA shall comply with HUD requirements either to submit the proposed contract changes for prior HUD approval or to certify that the proposed work is within the scope of the contract and that any additional costs are within the latest HUD-approved budget or otherwise approved by HUD.

(h) *Construction requirements.* The IHA shall submit to the HUD office periodic progress reports and shall submit all contract settlement documents for prior HUD approval.

(i) *Management improvement contracts.* The IHA shall obtain consultant services through the competitive proposal process, as described in § 905.175(d). The IHA shall comply with HUD requirements either to

(1) Submit contracts for management improvements, as well as contract changes, for prior HUD approval; or

(2) Certify that the contracts accurately reflect HUD-approved work, do not exceed the HUD-approved budget amount, and have received HUD



clearance under previous participation procedures.

#### **§ 905.642 Fund requisitions.**

To request modernization funds against the total approved modernization budget, the IHA shall submit a request to the HUD office in accordance with HUD requirements.

(Approved by the office of Management and Budget under control number 2577-0104)

#### **§ 905.645 Progress reporting.**

For each quarter until completion of the modernization program, the IHA shall submit, in a form prescribed by HUD, to the HUD field office:

- (a) A report on modernization fund obligations and expenditures; and
- (b) A narrative report on management improvement progress, where applicable.

#### **§ 905.648 Budget revisions.**

The IHA shall not incur any modernization cost in excess of the total approved budget. The IHA shall submit a revision of the budget, in a form prescribed by HUD, if the IHA plans (within the total approved modernization budget) to incur modernization costs in excess of the approved budget amount for any development. The IHA also shall comply with HUD requirements either to:

- (a) Submit the proposed budget revision for prior HUD approval if the IHA plans to delete or substantially revise approved work items, add new work items, or incur modernization costs in excess of the approved budget amount for a work item; or
- (b) Certify that the revisions are necessary to carry out the approved work and do not result in the approved budget amount for any development being exceeded.

(Approved by the office of Management and Budget under control number 2577-0044)

#### **§ 905.651 On-site inspections.**

The IHA shall provide, by contract or otherwise, adequate and competent supervisory and inspection personnel during modernization, whether work is performed by contract or force account labor and with or without the services of an architect/engineer, to assure work quality and progress.

#### **§ 905.654 Fiscal closeout of a modernization program.**

Upon completion of a modernization program, the IHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to the HUD field office for review, audit verification, and approval. The IHA shall immediately remit any excess funds provided by

HUD. The audit shall follow the requirements of 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate indicates that there are still excess funds, the IHA shall remit the excess funds as directed by HUD. If the audited modernization cost certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD may direct.

#### **Comprehensive Grant Program (For IHAs That Own or Operate 500 or More Indian Housing Units) (250 or More Units Beginning in FFY 1993)**

##### **§ 905.660 Purpose.**

(a) *Purpose.* (1) The purpose of the Comprehensive Grant program (CGP) under this subpart is:

(i) To provide modernization assistance to IHAs that own or operate a total of 500 or more units of Indian housing (250 or more units beginning in FFY 1993) on a reliable and more predictable basis, to enable them to operate, upgrade, modernize, and rehabilitate Indian housing developments, to ensure their continued availability for low income families as decent, safe, and sanitary rental housing at affordable rents;

(ii) To provide considerable discretion to IHAs to decide the specific improvements, the manner of their execution, and the timing of the expenditure of funds;

(iii) To simplify significantly the program of Federal assistance for capital improvements in Indian housing developments;

(iv) To provide increased opportunities and incentives for more efficient management of Indian housing developments; and

(v) To give IHAs greater control in planning and expending funds for modernization, rehabilitation, maintenance, and improvement of Indian housing developments to benefit low income families.

(2) The purpose of the sections under the undesignated heading entitled, Comprehensive Grant Program (CGP), is to set forth the policies and procedures for the CGP under which IHAs that own or operate a total of 500 or more units of Indian housing (250 or more units beginning in FFY 1993) receive financial assistance on a formula grant basis in accordance with § 905.601(e) and (f) for the modernization of Indian housing developments.

##### **§ 905.666 Eligible costs.**

(a) *General.* An IHA may use financial assistance received under the CGP for the following eligible costs:

(1) Undertaking activities described in its approved action plan under § 905.672(d)(5) and its annual statement under § 905.678;

(2) carrying out emergency work, whether or not the need is indicated in the IHA's approved comprehensive plan (including the action plan) or annual statement;

(3) Funding a replacement reserve to carry out eligible activities in future years, subject to the restrictions set forth in paragraph (g) of this section;

(4) Preparing the comprehensive plan and action plan under § 905.672, including reasonable costs necessary to assist residents to participate in a meaningful way in the planning, implementation and monitoring process; and

(5) Carrying out an audit, in accordance with 24 CFR part 44 and § 905.120.

(b) *Demonstration of viability.* Except in the case of emergency work, an IHA shall only expend funds on a development for which the IHA has demonstrated that completion of the improvements and replacements identified in the comprehensive plan will reasonably ensure the long-term physical and social viability of the development at a reasonable cost.

(c) *Physical improvement costs.* Eligible costs include alterations, betterments, additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 905.603. These mandatory standards may be exceeded only when the IHA determines that it is necessary or highly desirable for the long-term physical and social viability of the individual development. Such development specific work may include property purchases. If demolition or disposition is proposed, the IHA shall comply with 24 CFR part 905, subpart M.

(d) *Costs for Turnkey III and Mutual Help developments.*—(1) *Eligible costs.* Eligible physical improvement costs for existing Turnkey III and Mutual Help developments are limited to work items which are not the responsibility of the homebuyer families and which are related to health and safety, correction of development deficiencies, physical accessibility, energy audits and cost-effective energy conservation measures, and lead-based paint testing and abatement. In addition, management improvements are eligible modernization costs for existing homeownership developments. Costs of health and safety work items shall increase the purchase price and amortization period for homebuyer



families, in accordance with § 905.602; other eligible costs shall not increase the purchase price and amortization period.

(2) *Ineligible costs.* Nonroutine maintenance or replacements, additions, and items that are the responsibility of the homebuyer families are ineligible costs.

(3) *Exception for vacant or non-homebuyer-occupied Turnkey III units.* (i) Notwithstanding the requirements of paragraph (d)(2) of this section, an IHA may substantially rehabilitate a Turnkey III development whenever a unit becomes vacant or is occupied by a non-homebuyer family. An IHA that intends to use funds under this paragraph must identify in its needs assessment the estimated number of units that the IHA is proposing for substantial rehabilitation and subsequent sale. In addition, an IHA must demonstrate in its needs assessment that: the proposed modernization under this paragraph would result in bringing the identified units into full compliance with the homeownership objectives under the Turnkey III program (see subpart G); and the IHA has homebuyers who are both eligible for homeownership, in accordance with the requirements of 24 CFR part 905 (subpart G), and who have demonstrated their intent to be placed into each of the Turnkey III units proposed to be substantially rehabilitated.

(ii) Before an IHA may be approved for the substantial rehabilitation of a unit under this paragraph, it must first deplete any Earned Home Payments Account (EHPA) or Non-Routine Maintenance Reserve (NRMR) pertaining to the unit, and request the maximum amount of operating subsidy. Any increase in the value caused by its substantial rehabilitation under this paragraph shall be reflected solely by its subsequent appraised value, and not by an automatic increase in its selling price.

(4) *One-time exception for Mutual Help units.* Notwithstanding the requirements of paragraph (d)(2) of this section, an IHA may use no more than a single CGP grant under this subpart for purposes of substantially rehabilitating a Mutual Help unit, and may do so only with a unit which is at least 10 years old, and which the IHA has identified in its comprehensive plan (including its action plan and annual statement).

(5) The IHA must maintain records by unit of the work carried out under this section to permit HUD to review the extent to which Mutual Help and Turnkey III units have been substantially rehabilitated.

(e) *Demolition and conversion costs.* Eligible costs include:

(1) Demolition of dwelling units or nondwelling facilities, where the demolition is approved by HUD under subpart M, and related costs, such as clearing and grading the site after demolition and subsequent site improvement to benefit the remaining portion of the existing development; and

(2) Conversion of existing dwelling units to different bedroom sizes.

(f) *Replacement reserve costs.* (1) Funding a replacement reserve to carry out eligible activities in future years is an eligible cost, subject to the following restrictions:

(i) Annual CGP funds are not needed for existing needs, as identified by the IHA in its needs assessments; or

(ii) A physical improvement requires more funds than the IHA would receive under its annual formula allocation; or

(iii) A management improvement requires more funds than the IHA may use under its 10% limit for management improvements, and the IHA needs to save a portion of its annual grant in order to combine it with a portion of subsequent year(s) grants, to fund the work item;

(2) The IHA shall invest replacement reserve funds so as to generate a return equal to or greater than the average 91-day Treasury bill rate;

(3) Interest earned on funds in the replacement reserve will not be added to the IHAs income in the determination of an IHA's operating subsidy eligibility, but must be used for eligible modernization costs;

(4) To the extent that its annual formula allocation and any unobligated balances of modernization funds are not adequate to meet emergency needs, an IHA must first use its replacement reserve, where funded, to meet emergency needs, before requesting funds from the \$75 million reserve. An IHA is not required to use its replacement reserve for natural and other disasters.

(g) *Management improvement costs.* Management improvements that are needed to upgrade the operation of the IHA's developments, sustain physical improvements at those developments or correct management deficiencies identified by the IHA in its comprehensive plan are eligible costs. An IHA's ongoing operating expenses, including direct provision of social services through either contract or force account labor, are ineligible management improvement costs.

(1) *Economic development activities costs.* Economic development activities such as job training, resident employment and resident businesses, for the purpose of carrying out activities related to the eligible management and

physical improvements are eligible costs, as approved by HUD. HUD encourages IHAs, to the greatest extent feasible, to hire residents as trainees or employees to carry out the modernization program under this subpart, and to contract with resident-owned businesses for modernization work.

(2) *Resident management costs.* Technical assistance to a resident council or resident management corporation (RMC), as defined in § 905.455, in order to determine the feasibility of the resident management entity or assist in its formation is an eligible cost.

(3) *Resident homeownership costs.* The study of the feasibility of converting rental to homeownership units, as well as the preparation of an application for conversion to homeownership, is an eligible cost.

(h) *Drug elimination costs.* Drug elimination activities involving management or physical improvements are eligible costs, as specified by HUD.

(i) *Administrative costs.* Administrative costs necessary for the planning, design, implementation and monitoring of the physical and management improvements are eligible costs and include the following:

(1) The salaries of nontechnical and technical IHA personnel assigned full-time or part-time to modernization are eligible costs only where the scope and volume of the work are beyond that which could be reasonably expected to be accomplished by such personnel in the performance of their nonmodernization duties. The IHA shall properly apportion to the appropriate program budget any direct charges for the salaries of assigned full- or part-time staff (e.g., to the CIAP, CGP or operating budgets);

(2) IHA contributions to employee benefit plans on behalf of nontechnical and technical IHA personnel are eligible costs in direct proportion to the amount of salary charged to the CGP; and

(3) Other administrative costs, such as telephone and facsimile, as specified by HUD.

(j) *Audit costs.*

(k) *Architectural/engineering and consultant fees.* Fees for planning, preparation of needs assessments and required documents, detailed design work, preparation of construction and bid documents, lead-based paint testing, etc., are eligible costs.

(1) *Relocation costs.* Relocation costs as a direct result of rehabilitation, demolition or acquisition for a CGP-funded activity are eligible costs, as required by § 905.120.



(m) *Cost limitations.*—(1) An IHA shall not use more than a total of 10 percent of its annual grant for management improvement costs in account 1408, unless specifically approved by HUD.

(2) An IHA shall not use more than a total of 7 percent of its annual grant on administrative costs in account 1410, excluding any costs related to in-house lead based paint testing, in-house architectural/engineering (A/E) work, or other special administrative costs required by State, Tribal or local law, unless specifically approved by HUD. In the case of an IHA whose jurisdiction covers an unusually large geographic area, an additional two percent of the annual grant may be spent on costs related to travelling to the IHA's developments for CGP-related business, as specifically approved by HUD. (For purposes of this paragraph, "an unusually large geographic area" means an area served by an IHA whose offices are physically separated from the majority of its developments by distances which require overnight travel and/or travel by air or other commercial carriers, e.g., a statewide IHA with developments in multiple localities; a regional IHA with developments in multiple counties or States; or an Alaska IHA with developments in multiple villages.)

(3) Where the physical or management improvement will benefit programs other than Indian Housing, such as Section 8, local renewal, etc., eligible costs are limited to the amount directly attributable to the Indian Housing Program.

(n) *Ineligible costs.* An IHA (or an RMC acting on behalf of an IHA) shall not make luxury improvements, or carry out any other ineligible activities, as specified by HUD.

#### **§ 905.667 Reserve for emergencies and disasters.**

(a) *Emergencies.*—(1) *Eligibility for assistance.* An IHA (including an IHA that is not considered to be administratively capable under § 905.135) may obtain funds, at any time, for any eligible emergency work item under § 905.102, from the reserve established under § 905.601(b), except that such funds may not be provided to an IHA that has the necessary funds available from any of the following sources: under its annual formula allocation under § 905.601(e) and (f); from other unobligated modernization funds; or from its replacement reserves under § 905.666. An IHA is not required to have an approved comprehensive plan under § 905.672 before it can

request emergency assistance from this reserve.

(2) *Procedure.* To obtain emergency funds, an IHA must submit a request, in a form to be prescribed by HUD, which demonstrates that without the requested funds from the set-aside under this section, the IHA does not have adequate funds available to correct the conditions which present an immediate threat to the health or safety of the residents. HUD will immediately process a request for such assistance and, if it determines that the IHA's request meets the requirements of paragraph (a)(1) of this section, it shall approve the request, subject to the availability of funds in the reserve.

(3) *Repayment.* An IHA that receives assistance for its emergency needs from the reserve under § 905.601(b) must repay such assistance from its succeeding years' formula allocations, where available. To this extent, HUD shall deduct up to 50 percent of an IHA's succeeding year's formula allocation under § 905.601 (e) and (f) to repay emergency funds previously provided by HUD to the IHA. The remaining balance, if any, shall be deducted from an IHA's succeeding years' formula allocations.

(b) *Natural and other disasters.*—(1) *Eligibility for assistance.* An IHA (including an IHA which has been determined by HUD not to be administratively capable under § 905.135) may request assistance at any time from the reserve under § 905.601(b) for the purpose of permitting the IHA to respond to a natural or other disaster. To qualify for assistance, the disaster must pertain to an extraordinary event affecting only one or a few IHAs, such as an earthquake or hurricane. Any disaster declared by the President (or which HUD determines would qualify for a Presidential declaration if it were on a larger scale) qualifies for assistance under this paragraph. An IHA may receive funds from the reserve regardless of the availability of other modernization funds or reserves, but only to the extent its needs are in excess of its insurance coverage. An IHA is not required to have an approved comprehensive plan under § 905.672 before it can request assistance from the reserve under § 905.601(b).

(2) *Procedure.* To obtain funding for natural or other disasters under § 905.601(b), an IHA must submit a request, in a form prescribed by HUD, which demonstrates that it meets the requirements of paragraph (b)(1) of this section. HUD will immediately process a request for such assistance and, if it determines that the request meets the requirements under paragraph (b)(1) of

this section, it will approve the request, subject to the availability of funds in the reserve.

(3) *Repayment.* Funds provided to an IHA under paragraph (b)(1) of this section for natural and other disasters shall be in the form of a grant, and are not required to be repaid.

#### **§ 905.669 Allocation of assistance.**

(a) *Submission of formula characteristics report.* (1) *Formula characteristics report.*—In its first year of participation in the CGP, each IHA shall verify and provide data to HUD, in a form and at a time to be prescribed by HUD, concerning IHA and development characteristics, so that HUD can develop the IHA's annual funding allocation under the CGP in accordance with § 905.601 (e) and (f). If an IHA fails to submit to HUD the formula characteristics report by the prescribed deadline, HUD will use the data which it has available concerning IHA and development characteristics for purposes of calculating the IHA's formula share. After its first year of participation in the CGP, an IHA is required to respond to data transmitted by HUD if there have been changes to its inventory from that previously reported, or where requested by HUD.

(2) *IHA Board Resolution.* The IHA must include with its formula characteristics report under paragraph (a)(1) of this section, a resolution adopted by the IHA Board of Commissioners approving the report, and certifying that the data contained in the formula characteristics report are accurate.

(b) *HUD notification of formula amount; appeal rights.*—(1) *Estimated formula amounts.* After HUD determines an IHA's estimated formula allocations under § 905.601 (e) and (f) based upon the IHA, development, and community characteristics, it shall notify the IHA of its estimated formula amount.

(i) *Appeal based upon unique circumstances.* An IHA may appeal in writing HUD's determination of its estimated formula amount within 60 calendar days of the date of HUD's determination on the basis of "unique circumstances." The IHA must indicate how it is unique, and specify the manner in which it is different from all other IHAs participating in the CGP, and provide any necessary supporting documentation. HUD shall render a written decision on an IHA's appeal under this paragraph within 60 calendar days of the date of its receipt of the IHA's request for an appeal. HUD shall publish in the *Federal Register* a description of the facts supporting any



successful appeals based upon "unique" circumstances. Any adjustments resulting in a particular FFY from successful appeals under this paragraph shall be made from the subsequent years' appropriation of funds under this part.

(ii) *Appeal based upon error.* (A) *Estimated formula amount.* An IHA may appeal in writing HUD's determination of its estimated formula amount within 30 calendar days of the date of HUD's determination on the basis of an error. The IHA must describe the nature of the error, and provide any necessary supporting documentation. HUD shall respond to the IHA's request within 60 calendar days of the date of its receipt of the IHA's request for an appeal. If HUD determines that there are no issues in dispute, it will inform the IHA within the 60-day period. Any adjustment resulting from successful appeals shall be made from the current year's allocation of funds under this subpart. If, however, HUD determines that there are substantial issues in dispute with respect to the appeal, HUD will so inform the IHA within the 30-day period. Any adjustments resulting from successful appeals, in this case, shall be made from the succeeding year's allocation of funds under the CGP.

(B) *Final formula amount.* An IHA may appeal in writing HUD's determination of its estimated formula amount within 30 calendar days of the date of HUD's determination on the basis of an error. The IHA must describe the nature of the error, and provide any necessary supporting documentation. If HUD determines that there are no issues in dispute, it will inform the IHA within the 60-day period. Any adjustment resulting from successful appeals shall be made from the current year's allocation of funds under this subpart, to the greatest extent feasible.

(c) *IHAs determined not to be administratively capable.* If an IHA is determined by HUD not to be administratively capable in accordance with § 905.135, the ACA, and the Field Office Monitoring of IHAs Handbook 7440.3, or if the IHA fails to meet, or to make reasonable progress toward meeting, the goals established in its management improvement plan under § 905.135, HUD may issue a notice of deficiency or a corrective action order. If the IHA fails to take corrective action in a reasonable period of time as specified by HUD in a corrective action order, pursuant to the procedures established in § 905.687, HUD may declare a breach of the grant agreement with respect to all or some of the IHA's functions so that the IHA or a particular function of

the IHA may be administered by another entity; HUD may withhold some or all of the IHA's annual grant; or HUD may take other sanctions authorized by law or regulation. (Copies of HUD Handbook 7440.3 may be obtained by writing to the HUD Regional Office of Indian Programs within the applicant's jurisdiction.)

#### § 905.672 Comprehensive plan (including action plan).

(a) *Deadline for submission.* As soon as possible after modernization funds first become available for allocation under this subpart, HUD shall notify IHAs in writing of their formula amount for use in developing their comprehensive plan, including the action plan, and the deadline for submitting a comprehensive plan.

(b)(1) *Resident participation.* An IHA is required to develop, implement, monitor and annually amend portions of its comprehensive plan in consultation with residents of the developments covered by the comprehensive plan, and with democratically elected resident groups. In addition, the IHA must also consult with resident management corporations (RMCs) to the extent that an RMC manages a development covered by the comprehensive plan. The IHA, in partnership with the residents, must develop and implement a process for resident participation which ensures that residents are involved in a meaningful way in all phases of the CGP. Such involvement shall involve implementing the Partnership Process as a critical element of the CGP.

(2) *Establishment of Partnership Process.* The IHA, in partnership with the residents of the developments covered by the plan, and with democratically elected resident groups, must establish a Partnership Process to develop and implement the goals, needs, strategies and priorities identified in the comprehensive plan. After residents have organized to participate in the CGP, they may decide to establish a volunteer advisory group of experts in various professions to assist them in the CGP Partnership Process. The Partnership Process shall be designed to achieve the following:

(i) To assure that residents are fully briefed and involved in developing the content of, and monitoring the implementation of, the comprehensive plan including, but not limited to, the physical and management needs assessments, viability analysis, action plan, and annual statement. Where necessary, the IHA shall develop and implement capacity building strategies to ensure meaningful resident

participation in the CGP. Such technical assistance efforts are eligible CGP costs.

(ii) To enable residents to participate, on an IHA-wide or area-wide basis, in ongoing discussions of the comprehensive plan and strategies for its implementation, and in all meetings necessary to ensure meaningful participation.

(3) *Initial notice.* Once HUD notifies an IHA of its estimated funding level, the IHA shall, within 30 calendar days of the date of HUD's notice, provide written notice to each of the democratically elected presidents of resident organizations of the developments covered by the comprehensive plan, concerning: HUD's estimated modernization funding level; a summary of the CGP requirements; the timeframes for completion of the required CGP documents; and the requirement for resident participation in the planning, development and monitoring of modernization activities under the CGP. This information shall also be made available to residents in written form and, where feasible, within each development.

(4) *Advance meeting for resident groups.* The IHA shall hold, at least three weeks before the public hearing under paragraph (b)(5) of this section, a meeting for residents and resident groups at which the IHA shall provide residents with draft copies of the executive summary, and shall explain the components of the comprehensive plan. The IHA shall make reasonable efforts to provide advance notice to all residents of the date and time of the meeting (in the form of flyers, advertisements, etc.). Residents shall be advised prior to the meeting that the comprehensive plan shall be available for their review at specified locations within the IHA's jurisdiction. The meeting shall be open to all residents and resident groups.

(5) *Public hearing.* The IHA shall hold at least one public hearing, and any appropriate number of additional hearings, to ensure ample opportunity for residents, resident groups, local government officials, and other interested parties, to express their priorities and concerns. The IHA shall make reasonable efforts to provide advance written notice to each resident of the date and time of the public hearing. The IHA shall give full consideration to the comments and concerns of residents, local government officials, and other interested parties.

(c) *Local government participation.* An IHA shall consult with appropriate local government officials with respect to the development of the



comprehensive plan. In the case of an IHA with developments in multiple jurisdictions, the IHA may meet this requirement by consulting with an advisory group representative of all the jurisdictions. At a minimum, such consultation must include providing such officials with:

(1) Advance written notice of the public hearing required under paragraph (b)(5) of this section;

(2) A copy of the executive summary; and

(3) An opportunity to express their priorities and concerns to ensure due consideration in the IHA's planning process.

(d) *Contents of comprehensive plan.* The comprehensive plan shall identify all of the physical and management improvements needed for an IHA and all of its developments, and that represent needs eligible for funding under § 905.666. The plan shall also include preliminary estimates of the total cost of these improvements. The plan shall set forth general strategies for addressing the identified needs, and highlight any special strategies, such as major redesign or partial demolition of a development, that are necessary to ensure the long-term physical and social viability of the development. Each comprehensive plan shall contain the following elements:

(1) *Executive summary.* An IHA shall include as part of its comprehensive plan an Executive Summary to facilitate review and comprehension by development residents and by the public. The Executive Summary shall include:

(i) A summary of total preliminary estimated costs to address physical needs by each development and management/operations needs IHA-wide;

(ii) A statement by the IHA concerning its overall modernization strategy, and its rationale for the approach and priorities adopted in its comprehensive plan. For example, an IHA's strategy may be that it will focus its resources on addressing its vacant properties before it brings its occupied units up to the modernization standards;

(iii) A statement by the IHA of its plan for development(s) currently funded for comprehensive modernization under the CIAP; and

(iv) A specific description of the IHA's process for maximizing the level of participation by residents during the development, implementation and monitoring of the comprehensive plan, a summary of all resident and other comments on the plan and the IHA's response to those comments. IHA records, such as minutes of planning

meetings or resident surveys, shall be maintained in the IHA's files and made available to residents, resident organizations, and other interested parties, upon request.

(2) *Physical needs assessment.*—(i) *Requirements.* The physical needs assessment identifies all of the work that an IHA would need to undertake to bring each of its developments up to the modernization and energy conservation standards, as required by section 14(e)(1)(A)(ii) of the Act, to comply with lead-based paint testing and abatement requirements under § 905.120(i), and to comply with other program requirements under § 905.120. The physical needs assessment is completed without regard to the availability of funds, and shall include the following information with respect to each of an IHA's developments:

(A) A brief summary of the physical improvements necessary to bring each development to a level at least equal to the modernization standards contained in HUD Handbook 7485.2 (Public and Indian Housing Modernization Standards), and to the energy conservation and life-cycle cost-effective performance standards, as required in § 905.603, and to comply with the Lead-Based Testing and Abatement requirements under § 905.120(i), and the relative urgency of need also must be indicated. If the IHA has no physical improvement needs at a particular development at the time it completes its comprehensive plan, it must so indicate. Similarly, if the IHA intends to demolish, partially demolish, convert, or dispose of a development (or units within a development) it must so indicate in the summary of physical improvements;

(B) The replacement needs of equipment systems and structural elements that will be required to be met (assuming routine and timely maintenance is performed) during the period covered by the action plan;

(C) A preliminary estimate of the cost to complete the physical work;

(D) The projected FFY in which the IHA anticipates that the development will meet the modernization and energy conservation standards;

(E) Any physical disparities between buildings occupied predominantly by one racial or ethnic group and buildings occupied predominantly by other racial or other ethnic groups and, in such cases, the physical improvements required to correct the conditions. This requirement shall apply only to IHAs which are determined, on a case-by-case basis, to be subject to title VI of the Civil Rights Act of 1964 and title VIII of the Civil Rights Act of 1968;

(F) In addition, the IHA shall provide the following information:

(1) The Mutual Help units that the IHA is proposing for substantial rehabilitation, in accordance with § 905.666(b)(2);

(2) With respect to vacant or non-homebuyer-occupied Turnkey III units and the estimated number of units that the IHA is proposing for substantial rehabilitation and subsequent sale, in accordance with § 905.666(b)(3);

(ii) *Sources of data.* The IHA shall identify in its needs assessment the sources from which it derived data to develop the physical needs assessment under this paragraph, and shall retain such source documents in its files.

(3) *Management needs assessment.* (i) *Requirements.* The plan shall include a comprehensive assessment of the improvements needed to upgrade the management and operation of the IHA and of each viable development so decent, safe and sanitary living conditions will be provided. The management needs assessment shall include the following, with the relative urgency of need indicated:

(A) An identification of the most current needs related to the following areas (to the extent that any of these needs is addressed in a HUD-approved management improvement plan, the IHA may simply include a cross-reference to these documents);

(1) The management, financial, and accounting control systems of the IHA;

(2) The adequacy and qualifications of personnel employed by the IHA in the management and operation of its developments, for each significant category of employment;

(3) The adequacy and efficacy of:

(i) Resident programs and services;

(ii) Resident and development security;

(iii) Resident selection and eviction;

(iv) Occupancy;

(v) Maintenance;

(vi) Resident management and resident capacity building programs;

(vii) Resident opportunities for employment and business development and other self-sufficiency opportunities for residents; and

(viii) Homeownership opportunities for residents.

(B) Any additional deficiencies identified through audits and HUD monitoring reviews which are not addressed under paragraph (d)(3)(i)(A) of this section. To the extent that any of these is addressed in a HUD-approved management improvement plan, the IHA may include a cross-reference to these documents;



(C) Any other management and operations needs which the IHA wants to address at the IHA-wide or development level;

(D) An IHA-wide preliminary cost estimate for addressing all the needs identified in the management needs assessment, without regard to the availability of funds; and

(E) The projected FFY in which the IHA anticipates that all identified management deficiencies will be corrected.

(ii) *Sources of data.* The IHA shall identify in its needs assessment the sources from which it derived data to develop the management needs assessment under this paragraph, and shall retain such source documents in its files.

(4) *Demonstration of long-term physical and social viability—(i) General.* The plan shall include, on a development-by-development basis, an analysis of whether completion of the improvements and replacements identified under paragraphs (d)(2) and (d)(3) of this section will reasonably ensure the long-term physical and social viability of the development at a reasonable cost.

(ii) *Developments with hard cost of 90 percent or less of TDC.* Where the preliminary estimate of hard cost for work proposed at a development is 90 percent or less of TDC, and the IHA determines that, upon completion of the improvements and replacements under paragraphs (d)(2) and (d)(3) of this section, the development can reasonably be expected to be structurally sound and achieve full occupancy, the IHA may determine that the development has long-term physical and social viability at a reasonable cost.

(iii) *Developments with hard cost of greater than 90 percent of TDC.* Where the preliminary estimate of hard cost for work proposed at a development exceeds 90 percent of TDC, the IHA shall complete and submit to HUD, as part of its comprehensive plan, a viability analysis of the development, as prescribed by HUD. Where the IHA determines that completion of the improvements and replacements identified under paragraphs (d)(2) and (d)(3) of this section, the development can reasonably be expected to be structurally sound and achieve full occupancy, the IHA shall also submit to HUD a request to exceed the 90 percent of TDC. The Field Office shall review such requests on a case-by-case basis, in accordance with the following criteria:

(A) The IHA has adequately explained any special or unusual conditions, justified all work as

necessary to meet the modernization and energy conservation standards, provided reasonable cost estimates, and made every effort to reduce costs;

(B) Rehabilitation of the existing development is more cost-effective in the long-term than construction or acquisition of replacement housing; and

(C) The IHA has no practical low-income housing alternative.

(iv) *Determination of non-viability.* Where an IHA's analysis of a development, either under paragraph (c) or (d) of this section, establishes that completion of the identified improvements and replacements will not result in the long-term physical and social viability of the development at a reasonable cost, the IHA shall not expend CGP funds for the development, except for emergencies. The IHA shall specify in its comprehensive plan the actions it proposes to take with respect to the non-viable development (e.g., demolition or disposition under subpart M).

(5) *Five-year action plan—(i) General.* The comprehensive plan shall include a rolling five-year action plan to carry out the improvements and replacements (or a portion thereof) identified under paragraphs (d)(2) and (d)(3) of this section. The IHA shall develop the action plan based on estimates provided by HUD of the amount of assistance the IHA will receive annually for a five-year period under § 905.103 (e) and (f) (for this purpose, the IHA should assume that the current year level of funding will be available for each year of its five-year plan), and an IHA's estimate of the funds that will be available from other sources, such as State, local and Tribal governments. All activities specified in an IHA's action plan are contingent upon the availability of funds.

(ii) *Requirements.* Under the action plan, an IHA must indicate how it intends to use the funds available to it under the CGP to address the deficiencies, or a portion of the deficiencies, identified under its physical and management needs assessments, as follows:

(A) *Physical condition.* With respect to the physical condition of an IHA's developments, an IHA must indicate in its action plan how it intends to address, over a five-year period, the deficiencies (or a portion of the deficiencies) identified in its physical needs assessment so as to bring each of its developments up to a level at least equal to the modernization and energy conservation standards. This would include specifying the work to be undertaken by the IHA in major work categories (e.g., kitchens, electrical

systems, etc.); establishing priorities among the major work categories by development and year based upon the relative urgency of need; and estimating the cost of each of the identified major work categories. In addition, an IHA must estimate the FFY in which it anticipates that the development will meet the modernization and energy conservation standards. In developing its action plan, an IHA shall give priority to the following:

(1) Activities required to correct emergency conditions;

(2) Activities required to meet statutory (or other legally mandated) requirements;

(3) Activities required to meet the needs identified in the Section 504 needs assessment within the regulatory timeframes; and

(4) Activities required to complete lead-based paint testing and abatement requirements by December 6, 1994.

(B) *Management and operations.* An IHA must address in its action plan the management and operations deficiencies (or a portion of the deficiencies) identified in its management needs assessment, as follows:

(1) With respect to the management and operations needs of the IHA, the IHA must identify how it intends to address with CGP funds, if necessary, the deficiencies (or a portion thereof) identified in its management needs assessment, including work identified through audits, the ACA, HUD monitoring reviews, and self-assessments (this would include establishing priorities based upon the relative urgency of need);

(2) A preliminary IHA-wide cost estimate, by major work category.

(iii) *Procedure for maintaining current five-year action plan.* The IHA shall maintain a current five-year action plan by annually amending its action plan, in connection with the submission of its annual statement, so that the previous year of the existing action plan is eliminated and an additional year is added.

(6) *Local government statement.* The comprehensive plan shall include a statement signed by the chief executive officer of the appropriate governing body (or, in the case of an IHA with developments in multiple jurisdictions, from the CEO of each such jurisdiction), certifying as to the following:

(i) The IHA developed the comprehensive plan/annual statement in consultation with officials of the appropriate governing body and with development residents covered by the comprehensive plan/annual statement,



in accordance with the requirements of § 905.672(b)(3).

(ii) The comprehensive plan/annual statement is consistent with the appropriate governing body's assessment of its low income housing needs and that the appropriate governing body will cooperate in providing resident programs and services.

(iii) The IHA's proposed drug elimination activities are coordinated with, and supportive of, local drug elimination strategies and neighborhood improvement programs, if applicable.

(7) *IHA resolution.* The plan shall include a resolution adopted by the IHA Board of Commissioners, and signed by the Board Chairman of the IHA, approving the comprehensive plan or any amendments thereto and certifying that:

(i) The IHA will comply with all policies, procedures, and requirements prescribed by HUD for modernization, including implementation of the modernization in a timely, efficient, and economical manner;

(ii) IHA has established controls to assure that any activity funded by the CGP is not also funded by any other HUD program, thereby preventing duplicate funding of any activity;

(iii) The IHA will not provide to any development more assistance under the CGP than is necessary to provide affordable housing, after taking into account other government assistance provided;

(iv) The proposed physical work will meet the modernization and energy conservation standards under § 905.603;

(v) The proposed activities, obligations and expenditures in the Annual Statement are consistent with the proposed or approved Comprehensive Plan of the IHA;

(vi) The IHA will comply with applicable civil rights requirements under § 905.115, and, where applicable, will carry out the Comprehensive Plan in conformity with Title VI of the Civil Rights Act of 1964, the Fair Housing Act, and Section 504 of the Rehabilitation Act of 1973;

(vii) The IHA will, to the greatest extent feasible, give preference to the award of modernization contracts to Indian organizations and Indian-owned economic enterprises under § 905.165;

(viii) The IHA has provided HUD with any documentation that the Department needs to carry out its review under the National Environmental Policy Act (NEPA) and other related authorities in accordance with § 905.120 (a) and (b), and will not obligate, in any manner, the expenditure of CGP funds, or otherwise undertake the activities identified in its

Comprehensive Plan/Annual Statement, until the IHA receives written notification from HUD indicating that the Department has complied with its responsibilities under NEPA and other related authorities;

(ix) The IHA will comply with the wage rate requirements under § 905.120 (c) and (d);

(x) The IHA will comply with the relocation assistance and real property acquisition requirements under § 905.120(e);

(xi) The IHA will comply with the requirements for physical accessibility under § 905.120(f);

(xii) The IHA will comply with the requirements for access to records and audits under § 905.120(g);

(xiii) The IHA will comply with the uniform administrative requirements under § 905.120(h);

(xiv) The IHA will comply with lead-based paint testing and abatement requirements under § 905.120(i);

(xv) The IHA has complied with the requirements governing Tribal government and resident participation in accordance with §§ 905.672(b), 905.678(b), and 905.684, and has given full consideration to the priorities and concerns of Tribal government and residents, including any comments which were ultimately not adopted, in preparing the Comprehensive Plan/Annual Statement and any amendments thereto;

(xvi) The IHA will comply with the special requirements of § 905.666(d) with respect to a homeownership development; and

(xvii) The IHA will comply with the special requirements of § 905.633 with respect to a Section 23 leased housing bond-financed development.

(e) *Amendments to the comprehensive plan.*—(1) *Extension of time for performance.* An IHA shall have the right to amend its comprehensive plan (including the action plan) to extend the time for performance whenever HUD has not provided the amount of assistance set forth in the comprehensive plan or has not provided the assistance in a timely manner.

(2) *Amendments to needs assessments.* The IHA must amend its plan by revising its needs assessments whenever it proposes to carry out activities in its action plan or annual statement which are not reflected in its current needs assessments (except in the case of emergencies). When the basis for the needs assessment have changed substantially, an IHA may propose an amendment to its needs assessments, in connection with the submission of its annual statement (see § 905.678(b)), or at any other time. These

amendments shall be reviewed by HUD in accordance with § 905.675.

(3) *Six-year revision of comprehensive plan.* The physical and management needs assessments, and the executive summary, are required to be revised only every sixth year, although the IHA may elect to revise some or all of these assessments more frequently. Consequently, every sixth year, an IHA must submit to HUD, with its annual statement, a complete revision of its comprehensive plan.

(4) *Annual revision of action plan.* Annually, the IHA shall submit to HUD, with its annual statement, an update of its five-year action plan, eliminating the previous year and adding an additional year.

(5) *Required submissions.* Any amendments to the comprehensive plan under this section must be submitted with the IHA resolution under § 905.672(d)(7).

(f) *Prerequisite for receiving assistance.*—(1) *Prohibition of assistance.* No financial assistance, except for emergency work to be funded under §§ 905.601(b) and 905.666(a)(2), and for modernization needs resulting from disasters under § 905.601(b), may be made available under this subpart unless HUD has approved a comprehensive plan submitted by the IHA which meets the requirements of § 905.672. An IHA that has failed to obtain approval of its comprehensive plan by the end of the FFY shall have its formula allocation for that year (less any formula amounts provided to the IHA for emergencies) added to the subsequent year's appropriation of funds for grants under this part. HUD shall allocate such funds to IHAs and PHAs participating in the CGP in accordance with the formula under § 905.601 (e) and (f) in the subsequent FFY. An IHA which elects in any FFY not to participate in the CGP under this subpart may participate in the CGP in subsequent FFYs.

(2) *Requests for emergency assistance.* An IHA may receive funds from its formula allocation to address emergency modernization needs where HUD has not approved an IHA's comprehensive plan. To request such assistance, an IHA shall submit to HUD a request for funds in such form as HUD may prescribe, including any documentation necessary to support its claim that an emergency exists. HUD shall review the request and supporting documentation to determine if it meets the definition of "emergency work," as set forth in § 905.102. (The information collections in this section have been approved by the Office of Management



and Budget under OMB control number 2577-0157.)

**§ 905.675 HUD review and approval of comprehensive plan (including action plan).**

(a) *Submission of comprehensive plan.* (1) Upon receipt of a comprehensive plan from an IHA, HUD shall determine whether:

(i) The plan contains each of the required components specified at § 905.672(d); and

(ii) Where applicable, the IHA has submitted any additional information or assurances required as a result of HUD monitoring, findings of inadequate IHA performance, audit findings, or civil rights compliance findings.

(2) *Acceptance for review.* If the IHA has submitted a comprehensive plan (including the action plan) which meets the criteria specified in paragraph (a)(1) of this section, HUD shall accept the comprehensive plan for review, within 14 calendar days of its receipt in the field office. The IHA shall be notified in writing that the plan has been accepted by HUD, and that the 75-day review period is proceeding.

(3) *Time period for review.* A comprehensive plan that is accepted by HUD for review shall be considered to be approved unless HUD notifies the IHA in writing, postmarked within 75 calendar days of the date of HUD's receipt of the comprehensive plan for review, that HUD has disapproved the plan. HUD shall not disapprove a comprehensive plan on the basis that it cannot complete its review within the 75-day deadline.

(4) *Rejection of comprehensive plan.* If an IHA has submitted a comprehensive plan (including the action plan), which does not meet the requirements of paragraph (a)(1) of this section, HUD shall notify the IHA within 14 calendar days of its receipt that HUD has rejected the plan for review. In such case, HUD shall indicate the reasons for rejection, the modifications required to qualify the comprehensive plan for HUD review, and the deadline date for receipt of any modifications.

(b) *HUD approval of comprehensive plan (including action plan).* (1) A comprehensive plan (including the action plan) that is accepted by HUD for review in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the IHA in writing, postmarked within 75 days of the date of HUD's receipt of the comprehensive plan for review, that HUD has disapproved the plan, indicating the reasons for disapproval, and the modifications required to make the comprehensive plan approvable. The IHA must re-submit the comprehensive

plan to HUD, in accordance with the deadline established by HUD, which may allow up to 75 calendar days before the end of the FFY for HUD review. If the revised plan is disapproved by HUD following its resubmission, or the IHA fails to resubmit the plan by the deadline established by HUD, any funds that would have been allocated to the IHA shall be added to the subsequent year's appropriation of funds for grants under this subpart. HUD shall allocate such funds to IHAs and PHAs participating in the CGP in accordance with the formula under § 905.601. HUD shall not disapprove a comprehensive plan on the basis that the Department cannot complete its review under this section within the 75-day deadline.

(2) HUD shall approve the comprehensive plan except where it makes a determination in accordance with one or more of the following:

(i) *The comprehensive plan is incomplete in significant matters.* HUD determines that the IHA has failed to include all required information or documentation in its comprehensive plan, e.g., the physical needs assessment does not provide all of the information required by HUD concerning all of its developments; or the IHA has supplied incomplete data on the current condition and other characteristics of its developments;

(ii) *Identified needs are plainly inconsistent with facts and data.* On the basis of available significant facts and data pertaining to the physical and operational condition of the IHA's developments or the management and operations of the IHA, HUD determines that the IHA's identification of modernization needs (see § 905.672(d) (2) and (3)) is plainly inconsistent with such facts and data. HUD will take into account facts and data such as those derived from recent HUD monitoring, audits, and resident comments and will disapprove a comprehensive plan based on such findings as:

(A) *Identified physical improvements and replacement are inadequate.* The completion of the identified physical improvements and replacements will not bring all of an IHA's developments to a level at least equal to the modernization and energy conservation and life-cycle cost-effective standards in § 905.603 (except that a development must meet the energy conservation standards under § 905.603 only when they are applicable to the work being performed);

(B) *Identified management improvements are inadequate.* The identified management and operations improvement needs do not address all of an IHA's areas of deficiency, or the completion of those improvements

would not result in each area of deficiency under an IHA's management improvement plan under § 905.135 being brought up to an acceptable level of performance under the ACA and the Field Office Monitoring of IHAs Handbook 7440.3; and

(C) *Proposed physical and management improvements fail to address identified needs.* The proposed physical and management improvements in the action plan are not related to the identified needs in the needs assessments portion of the comprehensive plan, e.g., a heating plant renovation is in the action plan, but it was not included in the needs assessment for that development.

(iii) *Action plan is plainly inappropriate to meeting identified needs.* On the basis of the comprehensive plan, HUD determines that the action plan (see § 905.672(d)(5)) is plainly inappropriate to meet the needs identified in the comprehensive plan, e.g., the proposed work item will not correct the need identified in the needs assessment. HUD will take into account the availability of funds. In addition, HUD will take into account whether the action plan fails to address work items that are needed to correct known emergency conditions or which are otherwise needed to meet statutory or other legally mandated requirements, as identified by the IHA in its comprehensive plan.

(iv) *Inadequate demonstration of long-term viability at reasonable cost.* HUD determines that the IHA has failed to demonstrate that completion of improvements and replacements identified in the comprehensive plan, as required by § 905.672(d) (2) and (3), will reasonably ensure long-term viability of one or more Indian housing developments to which they relate at a reasonable cost, as required by § 905.672(d)(4).

(v) *Contradiction of local government statement or IHA resolution.* HUD has evidence which tends to challenge, in a substantial manner, the appropriate governing body's statement or IHA resolution contained in the comprehensive plan, as required in § 905.672(d) (6) and (7). Such evidence may include, but is not necessarily limited to:

(A) Evidence that the IHA failed to implement the Partnership Process and to meet the requirements for resident participation, as set forth in § 905.672(b). In such cases, HUD shall review the IHA's resident participation process and any supporting documentation to determine whether the standards for



participation under § 905.672(b) were met;

(B) With respect to an IHA established under State law and determined to be subject to the requirements of title VI of the Civil Rights Act of 1964 and the Fair Housing Act, HUD shall also consider as such evidence the following:

(1) A pending proceeding against the IHA based upon a charge of discrimination pursuant to the Fair Housing Act. (For purposes of this provision, "a charge of discrimination" means a charge, pursuant to section 810(g)(2) of the Fair Housing Act, issued by the HUD General Counsel, or his or her legally authorized designee;)

(2) A pending civil rights suit against the IHA instituted by the Department of Justice;

(3) Outstanding HUD findings, under § 905.120, of IHA noncompliance with civil rights statutes and executive orders or implementing regulations, as a result of formal administrative proceedings, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance;

(4) A deferral of the processing of applications from the IHA imposed by HUD under title VI of the Civil Rights Act of 1964, the Attorney General's Guidelines (28 CFR 50.3) and the HUD title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1), or under section 504 of the Rehabilitation Act of 1973 and HUD section 504 regulations (24 CFR 8.57); or

(5) An adjudication of a violation under any of the authorities under § 905.120(a) in a civil action filed against the IHA by a private individual, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance.

(c) *Effect of HUD approval of comprehensive plan.* After HUD approves the comprehensive plan (including the action plan), or any amendments to the plan, it shall be binding upon HUD and the IHA, until such time as the IHA submits, and HUD approves, an amendment to its plan. If HUD determines as a result of an audit or monitoring findings that an IHA has provided false or substantially inaccurate data in its comprehensive plan, HUD may condition the receipt of assistance, in accordance with § 905.678(d). Moreover, in accordance with 18 U.S.C. 1001, any individual or entity who knowingly and willingly makes or uses a document or writing containing any false, fictitious or

fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

**§ 905.678 Annual statement of activities and expenditures.**

(a) *General.* HUD shall notify IHAs in writing of their estimated formula amount for use in developing the annual statement and an update of the five-year action plan. The annual statement is the first year of the five-year rolling base action plan, and is intended to provide a more detailed discussion of the activities, obligations and expenditures which the IHA plans to undertake, in whole or in part, with the assistance to be provided by HUD. Thus, the annual statement provides HUD, the residents, and the public with greater detail concerning the planned utilization of current year funds, than the remaining years covered by the action plan. An IHA may elect to submit an annual statement which covers up to a two-year period, to enable the IHA to shift work items within the two years of its approved annual statement. Such an IHA is still required to submit a new annual statement every year.

(b) *Submission.* After being advised by HUD of the estimated formula amount of assistance it will receive under this subpart with respect to any FFY, and estimating how much funding will be available from other sources, such as State and Tribal governments, the IHA shall submit an annual statement of activities and expenditures and an update of the action plan, in accordance with instructions provided by HUD.

(c) *Acceptance for review.* (1) Since the annual statement constitutes the first year (or, if so elected by an IHA, any period up to two years) of an IHA's rolling base action plan under § 905.672(d)(4), the IHA shall submit its annual statement to HUD at the same time that it submits its amendment to the action plan under § 905.672. Upon receipt of an annual statement from an IHA, HUD shall determine whether:

(i) It is complete in all significant matters; and

(ii) The IHA has submitted any additional information or assurances required as a result of HUD monitoring, findings of inadequate IHA performance, audit findings, and civil rights compliance findings.

(2) If the IHA has submitted a complete annual statement and all required information and assurances, HUD will accept the statement for review, as of the date of receipt. If the

IHA has not submitted all required material, HUD will promptly notify the IHA that it has disapproved the statement as submitted, indicating the reasons for disapproval, the modifications required to qualify the annual statement for HUD review, and the date by which such modifications must be received by HUD.

(d) *Resident and local government participation.* An IHA is required to develop its annual statement, including any proposed amendments to its comprehensive plan as provided in § 905.672(d), in consultation with officials of the appropriate governing body (or, in the case of an IHA with developments in multiple jurisdictions, in consultation with the CEO of each such jurisdiction or with an advisory group representative of all jurisdictions) and with residents of the developments covered by the comprehensive plan, as follows:

(1) *Notification.* The IHA will undertake reasonable efforts to provide advance written notice to each of the residents in the affected housing development(s), and to officials of the appropriate governing body, of the date and time of the public hearing under paragraph (d)(3) of this section. In addition, the IHA shall undertake reasonable efforts to provide advance written notice (in the form of flyers, advertisements, etc.) to all residents of the affected housing development(s) by means of advertisements or flyers of any other meetings which the IHA intends to hold, including the meeting with resident groups under paragraph (d)(2) of this section;

(2) *Meeting with resident groups.* The IHA shall hold, at least three weeks before the public hearing under paragraph (d)(3) of this section, a meeting with residents and resident groups at which the IHA will provide residents with information concerning the contents of the IHA's annual statement (and any proposed amendments to the IHA's comprehensive plan to be submitted with the annual statement) so that residents can comment adequately at the public hearing on the contents of the annual statement and any proposed amendments;

(3) *Public hearing.* The IHA shall hold a public hearing which allows residents of the developments covered by the comprehensive plan, democratically elected resident groups, officials of the appropriate governing body, and other interested parties, an opportunity to summarize their priorities and concerns. The IHA shall give full consideration to the comments and concerns of residents



of the affected developments and officials of the appropriate governing body in developing its annual statement, or any amendments to its comprehensive plan (including its updated action plan).

(e) *Contents of annual statement.* The annual statement must include, for each development (or on an IHA-wide basis for management improvements) for which work is to be funded out of that year's grant:

(1) A list of development accounts (e.g., "dwelling structures") with a general description of work items (e.g., "replace kitchen cabinets," "repair bathroom floors");

(2) The cost for each work item, as well as a summary of cost by development account;

(3) The IHA-wide or development-specific management improvements to be undertaken during the year;

(4) For each development and for or any management improvements not covered by a HUD-approved management improvement plan, a schedule for the use of current year funds, including target dates for the obligation and expenditure of the funds. In general, HUD expects that an IHA will obligate its current year's allocation of CGP funds (except for its funded replacement reserves) within two years, and expend such funds within three years, of the date of HUD approval, unless longer time-frames are approved by HUD due to local differences;

(5) A summary description of the actions to be taken with non-CGP funds to meet physical and management improvement needs which have been identified by the IHA in its needs assessments;

(6) Any documentation that HUD needs to assist it in carrying out its responsibilities under the National Environmental Policy Act and other related authorities in accordance with § 905.120 (a) and (b);

(7) Other information, as specified by HUD; and

(8) An IHA resolution approving the annual statement or any amendments thereto, as set forth in § 905.672(d)(7).

(f) *Additional submissions with annual statement.* An IHA must submit with the annual statement any amendments to the comprehensive plan, as set forth in § 905.672(e), and such additional information as may be prescribed by HUD. HUD shall review any proposed amendments to the comprehensive plan in accordance with the review standards under § 905.675(b).

(g) *HUD review and approval of annual statement—(1) General.* An annual statement accepted in accordance with paragraph (a) of this

section shall be considered to be approved, unless HUD notifies the IHA in writing, postmarked within 75 calendar days of the date that HUD accepts the annual statement for review under paragraph (c) of this section, that HUD has disapproved the annual statement, indicating the reasons for disapproval, the modifications required to make the annual statement approvable, and the date by which such modifications must be received by HUD. HUD shall not disapprove an annual statement on the basis that the Department cannot complete its review under this section within the 75-day deadline.

(2) *Bases for disapproval of annual statement.* HUD shall approve the annual statement, except where:

(i) *Plainly inconsistent with comprehensive plan.* HUD determines that the activities and expenditures proposed in the annual statement are plainly inconsistent with the IHA's approved comprehensive plan;

(ii) *Contradiction of IHA resolution.* HUD has evidence which tends to challenge, in a substantial manner, the certifications contained in the board resolution, as required by § 905.672(d)(7).

(h) *Amendments to annual statement.* The IHA shall submit to HUD for prior approval any major changes, as defined in § 905.102, except in the case of emergency work. Major changes shall be submitted in the form of an amendment to the IHA's approved annual statement. The IHA shall advise HUD of all changes due to emergencies in its performance and evaluation report submitted under § 905.684. HUD shall review a request to amend an annual statement in accordance with paragraph (f)(2) of this section. Any changes with respect to work items involving cumulatively less than 10% of an IHA's annual grant allocation do not require prior HUD approval, so long as the work is covered under the IHA's action plan. An IHA that has elected to submit an annual statement which covers up to a two year period may undertake without submitting an amendment for prior HUD approval the work items contained in either the first or second year of its annual statement. Such rescheduling of activities is not considered a major change.

(i) *Extension of time for performance.* An IHA may revise the target dates for fund obligation and expenditure in the approved annual statement whenever any valid delay outside the IHA's control occurs, as specified by HUD. Such revision is subject to HUD review and approval under § 905.687(a) (2) as to the IHA's continuing capacity. HUD

shall not review as to an IHA's continuing capacity any revisions to an IHA's comprehensive plan and related statements caused by HUD's failure to provide the amount of assistance set forth in the annual statement, or to provide such assistance in a timely manner.

(j) *ACC Amendment.* After HUD approval of each year's annual statement, HUD and the IHA shall enter into an ACC amendment to obtain modernization funds.

(Information collections requirements have been approved by the Office of Management and Budget under control number 2577-0157)

#### § 905.681 Conduct of modernization activities.

(a) *Initiation of activities.* After HUD has approved the annual statement and entered into an ACC amendment or grant agreement with the IHA, the IHA shall undertake the modernization activities and expenditures set forth in its approved annual statement, subject to the following requirements:

(1) The IHA may undertake the activities using force account or contract labor, including contracting with an RMC. If the entirety of modernization activity (including the planning and architectural design of the rehabilitation) is administered by an RMC, the IHA shall not retain for any administrative or other reason, any portion of the CGP funds provided, unless the IHA and the RMC provide otherwise by contract; and

(2) All activities shall be monitored by resident groups within the framework and intent of the Partnership Process.

(b) *Fund requisitions.* To request modernization funds against the approved annual statement, the IHA shall submit a request to HUD in accordance with requirements to be prescribed by HUD.

(c) *Contracting requirements.* The IHA shall comply with the wage rate requirements in § 905.120. In addition, the IHA shall comply with the requirements set forth in subpart B, except as follows:

(1) *Assurance of completion.* For each construction or equipment contract over \$25,000, the contractors shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding §§ 85.36(h) and 905.170, a 20 percent cash escrow, or a 25 percent letter of credit or, as may be required by law, separate performance and payments bonds, each for 50 percent or more of the contract price.

(2) *Previous participation.* The IHA shall obtain HUD clearance under previous participation procedures for



construction or equipment contract awards, over a HUD-specified amount, which shall include verifying that the contractor is not included on the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

(d) *Assurance of non-duplication.* The IHA shall ensure that there is no duplication between the activities carried out pursuant to the CGP, and activities carried out with other funds.

(e) *Fiscal closeout of a comprehensive grant.* Upon expenditure by an IHA of all funds, or termination by HUD of the activities funded by each annual grant, the IHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. The audit shall follow the guidelines prescribed by 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD may direct.

#### § 905.684 IHA performance and evaluation report.

(a) *Submission.* For any FFY in which an IHA has received assistance under this subpart, the IHA shall submit a performance and evaluation report, in a form and at a time to be prescribed by HUD, describing its use of assistance in accordance with the approved annual statement. The IHA must make reasonable efforts to notify residents and officials of the appropriate governing body of the availability of the draft report, make copies available to residents in the development office, and provide residents with at least 30 calendar days in which to comment on the report.

(b) *Content.* The report shall include the following:

(1) An explanation of how the IHA has used other funds, such as Community Development Block Grant program assistance, State or Tribal assistance, and private funding, for the needs identified in the IHA's comprehensive plan and for the purposes of this subpart;

(2) An explanation of how the IHA has used the CGP funds to address the needs identified in its comprehensive plan and to carry out the activities identified in its approved annual statement, and shall specifically address:

(i) Any funds used for emergency needs not set forth in its annual statement; and

(ii) Any deviations within the 10% cap for "major changes" to the annual statement under § 905.678;

(3) In the case of an IHA that has elected to submit an annual statement which covers up to a two-year period, any deviations in the order of work presented between years one and two of the approved annual statement;

(4) The results of the IHA's process for consulting with residents on the implementation of the plan;

(5) The current status of the IHA's obligations and expenditures and specifying how the IHA is performing with respect to the implementation schedules provided in its approved annual statement; and an explanation of any necessary revisions to the planned target dates;

(6) A summary of resident, Tribal or local government comments received on the report; and

(7) A resolution by the IHA Board of Commissioners approving the performance and evaluation report and containing a certification that the IHA has made reasonable efforts to notify residents in the development(s) of the opportunity to review the draft report and to comment on it before its submission to HUD, and that copies of the report were provided to residents in the development office, upon their request.

(Information collections have been approved by the Office of Management and Budget under control number 2577-0157)

#### § 905.687 HUD review of IHA performance.

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of the performance of each IHA as may be necessary or appropriate to make the determinations required by this paragraph, taking into consideration all available evidence.

(1) *Conformity with comprehensive plan.* HUD will determine whether the IHA has carried out its activities under this subpart in a timely manner and in accordance with its comprehensive plan.

(i) In making this determination, HUD will review the IHA's performance to determine whether the modernization activities undertaken during the period under review conform substantially to the activities specified in the approved annual statement, consistent with the approved comprehensive plan. HUD will also review an IHA's schedules which are provided with its annual statement for purposes of determining whether the IHA has carried out its modernization activities in a timely manner.

(ii) HUD will review an IHA's performance to determine whether the activities carried out comply with the

requirements of the Act, including the requirement that the work carried out meets the modernization and energy conservation standards in § 905.603, this part, and other applicable laws and regulations.

(2) *Continuing capacity.* HUD will determine whether the IHA has a continuing capacity to carry out its comprehensive plan in a timely manner. After the first full operational year of CGP, CIAP experience will not be taken into consideration except where the IHA has not yet had comparable experience under the CGP.

(i) The primary factors to be considered in arriving at a determination that a recipient has a continuing capacity are those described in paragraphs (a)(1) and (a)(3) of this section as they relate to carrying out the comprehensive plan. HUD generally will consider an IHA to have a continuing capacity if it determines that the IHA has:

(A) Carried out its activities under the CGP program, as well as the CIAP, in a timely manner, taking into account the level of funding available and whether the IHA obligates and expends approved modernization funds in accordance with the approved implementation schedule, (except in circumstances beyond the IHA's control);

(B) Adequately inspected the funded modernization to assure that the physical work is being carried out in accordance with the plans and specifications and the modernization and energy conservation standards (or, in the case of an IHA's performance under CIAP, whether the IHA has carried out the physical work in accordance with the HUD-approved budget and in conformance with the modernization and energy conservation standards) and that any HUD monitoring findings relating to the quality of the physical work have been, or are being, resolved;

(C) Established and maintained internal controls for its modernization program in accordance with HUD requirements for financial management and accounting, as determined by the fiscal audit;

(D) Administered its modernization contracts in accordance with a HUD-approved procurement policy, which meets the requirements of §§ 85.36(a) and 905.160;

(E) Carried out its activities in accordance with its comprehensive plan and HUD requirements; and

(F) Has satisfied, or made reasonable progress toward satisfying, the performance standards prescribed in



paragraph (a)(3) of this section as they relate to activities under the CGP program;

(ii) HUD will give particular attention to IHA efforts to accelerate the progress of the program and to prevent the recurrence of past deficiencies or noncompliance with applicable laws and regulations.

(3) *Reasonable progress.* HUD shall determine whether the IHA has satisfied, or has made reasonable progress towards satisfying, the following performance standards:

(i) With respect to the physical condition of each development, whether the work items being carried out by the IHA are in conformity with the modernization and energy conservation standards in § 905.603, and whether the IHA has brought, or is making reasonable progress toward bringing, all of its developments to these standards, in accordance with its physical needs assessment; and

(ii) With respect to the management condition of the IHA, whether the IHA is making reasonable progress in implementing the work items necessary to eliminate the deficiencies identified in its management needs assessment.

(b) *Notice of deficiency.* Based on HUD reviews of IHA performance and findings of any of the deficiencies in section (d), HUD may issue to the IHA a notice of deficiency stating the specific program requirements which the IHA has violated and requesting the IHA to take any of the actions in section (e).

(c) *Corrective action order.* (1) Based on HUD reviews of IHA performance and findings of any of the deficiencies in section (d), HUD may issue to the IHA a corrective action order, whether or not a notice of deficiency has previously been issued in regard to the specific deficiency on which the corrective action order is based. HUD may order corrective action at any time by notifying the IHA of the specific program requirements which the IHA has violated, and specifying that any of the corrective actions listed in section (e) must be taken. HUD shall design corrective action to prevent a continuation of the deficiency, mitigate any adverse effects of the deficiency to the extent possible, or prevent a recurrence of the same or similar deficiencies.

(2) Before ordering corrective action, HUD will notify the IHA and give it an opportunity to consult with HUD regarding the proposed action.

(3) Any corrective action ordered by HUD shall become a condition of the grant agreement.

(4) If HUD orders corrective action by an IHA in accordance with this section,

the IHA's Board of Commissioners must notify affected residents of HUD's determination, the bases for the determination, the conditioning requirements imposed under this paragraph, and the consequences to the IHA if it fails to comply with HUD's requirements.

(d) *Basis for corrective action.* HUD may order an IHA to take corrective action only if HUD determines:

(1) The IHA has not submitted a performance and evaluation report, in accordance with § 905.684;

(2) The IHA has not carried out its activities under the CGP program in a timely manner and in accordance with its comprehensive plan or HUD requirements, as described in paragraph (a)(1) of this section;

(3) The IHA does not have a continuing capacity to carry out its comprehensive plan in a timely manner or in accordance with its comprehensive plan or HUD requirements, as described in paragraph (a)(2) of this section;

(4) The IHA has not satisfied, or has not made reasonable progress towards satisfying, the performance standards specified in paragraph (a)(3) of this section;

(5) An audit conducted in accordance with 24 CFR part 44 and § 905.120, or pursuant to other HUD reviews (including monitoring findings) reveals deficiencies that HUD reasonably believes require corrective action;

(6) The IHA has failed to repay HUD for amounts awarded under the CGP program that were improperly expended; or

(7) The IHA has been determined to be high risk, in accordance with § 905.135.

(e) *Types of corrective action.* HUD may direct an IHA to take one or more of the following corrective actions:

(1) Submit additional information:

(i) Concerning the IHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for a IHA not meeting the standards in paragraph (a) (1), (2), or (3) of this section;

(ii) Explaining any steps the IHA is taking to correct the deficiencies;

(iii) Documenting that IHA activities were not inconsistent with the IHA's annual statement or other applicable laws, regulations, or program requirements; and

(iv) Demonstrating that the IHA has a continuing capacity to carry out the comprehensive plan in a timely manner;

(2) Submit schedules for completing the work identified in its annual statement and report periodically on its progress on meeting the schedules;

(3) Notwithstanding 24 CFR 85.36(g), submit to HUD the following documents for prior approval, which may include, but are not limited to:

(i) Proposed agreement with the architect/engineer (prior to execution);

(ii) Complete construction and bid documents (prior to soliciting bids);

(iii) Proposed award of contracts, including construction and equipment contracts and management contracts; or

(iv) Proposed contract modifications prior to issuance, including modifications to construction and equipment contracts, and management contracts.

(3) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's comprehensive plan, annual statement, or performance and evaluation report;

(4) Not incur financial obligations, or to suspend payments for one or more activities;

(5) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended;

(6) Take such other corrective actions HUD determines appropriate to correct IHA deficiencies.

(f) *Failure to take corrective action.* In cases where HUD has ordered corrective action and the IHA has failed to take the required actions within a reasonable time, as specified by HUD, HUD may take one or more of the following steps:

(1) Withhold some or all of the IHA's grant;

(2) Declare a breach of the ACC grant amendment with respect to some or all of the IHA's functions; or

(3) Any other sanction authorized by law or regulation.

(g) *Reallocation of funds that have been withheld.* Where HUD has withheld for a prescribed period of time some or all of an IHA's annual grant, HUD may reallocate such amounts to other IHAs/PHAs under the CGP program, subject to approval in appropriations acts. The reallocation shall be made to IHAs which HUD has determined to be administratively capable under § 905.135, and to PHAs under the CGP program which are not designated as either troubled or mod troubled under the PHMAP at part 901, based upon the relative needs of these IHAs and PHAs, as determined under the formula at § 905.601.

(h) *Right to appeal.* Before withholding some or all of the IHA's annual grant, declaring a breach of the ACC grant amendment, or reallocating funds that have been withheld, HUD



will notify the IHA and give it an opportunity, within a prescribed period of time, to present to the Assistant Secretary for Public and Indian Housing any arguments or additional facts and data concerning the proposed action.

(i) *Notification of residents.* The IHA's Board of Commissioners must notify affected residents of HUD's final determination to withhold funds, declare a breach of the ACC grant amendment, or reallocate funds, as well as the basis for, and the consequences resulting from, such a determination.

(j) *Recapture.* In addition, HUD may recapture for good cause any grant amounts previously provided to an IHA, based upon a determination that the IHA has failed to comply with the requirements of the CGP program. Before recapturing any grant amounts, HUD will notify the IHA and give it an opportunity to appeal in accordance with § 905.687(h). Any reallocation of recaptured amounts will be in accordance with § 905.687(g). The IHA's board of Commissioners must notify affected residents of HUD's final determination to recapture any funds.

#### Subpart J—Operating Subsidy

##### § 905.701 Purpose and applicability.

(a) *Implementation of section 9(a).* (1) The purpose of this subpart is to establish standards and policies for the distribution of operating subsidy in accordance with Section 9(a) of the United States Housing Act of 1937, 42 U.S.C. 1437g. Section 9(a) authorizes the Secretary of Housing and Urban Development (HUD) to make annual contributions for the operation of IHA-owned rental housing (operating subsidy).

(2) This subpart establishes standards for the cost of providing comparable services as determined in accordance with a formula representing the operations of a prototype well-managed project, taking into account the character and location of the project and the characteristics of the families served. These standards, policies and procedures are called the Performance Funding System (PFS), as described in this subpart. The provisions of PFS are intended to recognize and give an incentive for efficient and economical management and to avoid the expenditure of Federal funds to compensate for excessive costs attributable to poor or inefficient management. PFS is intended to provide the incentive and financial discipline for excessively high-cost IHAs to improve their management efficiency.

(b) *Applicability.* This subpart is applicable to all IHA-owned rental units

under Annual Contributions Contracts, except those in the State of Alaska. This subpart is not applicable to the Section 23 Leased Housing Program, the Section 23 Housing Assistance Payments Program, the Section 8 Housing Assistance Payments Program, the Mutual-Help Program, or the Turnkey III Homeownership Opportunity Program. Provisions regarding operating subsidy for the homeownership programs are found in the applicable subpart of this rule (E for Mutual Help and G for Turnkey III). Operating subsidy payments to the IHAs in Alaska for rental units are specified in subpart N.

##### § 905.705 Determination of amount of operating subsidy under PFS.

The amount of operating subsidy for which each IHA is eligible shall be determined as follows: The projected operating income level is subtracted from the total expense level (Allowable Expense Level plus Utilities Expense Level). These amounts are per-unit per-month dollar amounts, and must be multiplied by the Unit Months Available. Transition funding, if applicable, and other costs as specified in § 905.720 (b)–(e) are then added to this total in order to determine the total amount of operating subsidy for the requested budget year, exclusive of consideration of the cost of an independent audit. As an independent operating subsidy eligibility factor, an IHA may receive operating subsidy in an amount, approved by HUD, equal to the actual or estimated cost of the independent audit to be prorated to operations of the IHA-owned rental housing (under § 905.720(a)). See § 905.730 regarding adjustments.

##### § 905.710 Computation of allowable expense level.

The IHA shall compute its Allowable Expense Level (AEL) using forms prescribed by HUD, as follows:

(a) *Computation of Base Year Expense Level.* The Base Year Expense Level includes payments in lieu of taxes (PILOT) required by a Cooperation Agreement even if PILOT is not included in the approved operating budget for the base year because of a waiver of the requirements by the local taxing jurisdiction(s). The Base Year Expense Level includes all other operating expenditures as reflected in the IHA's operating budget for the base year approved by HUD except the following:

- (1) Utilities expense;
- (2) Cost of an independent audit;
- (3) Adjustments applicable to budget years before the base year;
- (4) Expenditures supported by supplemental subsidy payments

applicable to budget years before the base year;

(5) All other expenditures that are not normal fiscal year expenditures as to amount or as to the purpose for which expended; and

(6) Expenditures that were funded from a nonrecurring source of income.

(b) *Adjustment.* In compliance with the above six exclusions, the IHA shall adjust the AEL by excluding any of these items from the Base Year Expense Level if this has not already been accomplished. If such adjustment is made in the second or some later fiscal year of the PFS, the AEL shall be adjusted in the year in which the adjustment is made, but the adjustment shall not be applied retroactively. If the IHA does not make these adjustments, the HUD Field Office shall compute the adjustments.

(c) *Computation of Formula Expense Level.* The IHA shall compute its Formula Expense Level in accordance with a HUD-prescribed formula that estimates the cost of operating an average unit in a particular IHA's inventory. The formula takes into account such data as the number of two or more bedroom units, ratio of two or more bedroom units in high-rise family projects, ratio of units with three or more bedrooms, local government wage rates, and number of pre-1940 rental units occupied by poor households. It uses weights, and a local inflation factor assigned each year, to derive a Formula Expense Level for the current year and the requested budget year. The weights of the formula and the formula are subject to updating by HUD.

(d) *Computation of Allowable Expense Level.* The IHA shall compute its Allowable Expense Level as follows:

(1) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level does not exceed the top of the range.* The top of the range is defined as: FEL plus \$10.31 for fiscal years starting before April 1, 1992, and FEL multiplied by 1.15 for fiscal years starting on or after April 1, 1992. Every IHA whose Base Year Expense Level is less than the top limit of the range shall compute its AEL for the first budget year under PFS by adding the following to its Base Year Expense Level (before adjustment under § 905.730):

(i) Any increase approved by HUD in accordance with § 905.730(a);

(ii) The increase (decrease) between the Formula Expense Level for the base year and the Formula Expense Level for the first budget year under PFS; and

(iii) The sum of the Base Year Expense Level, and any amounts described in paragraphs (d)(1)(i) and (ii) of this



section multiplied by the local inflation factor.

(2) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level exceeds the top of the range.* The top of the range is defined as: FEL plus \$10.31 for fiscal years starting before April 1, 1992, and FEL multiplied by 1.15 for fiscal years starting on or after April 1, 1992. Every IHA whose Base Year Expense Level exceeds the top of the range shall compute its AEL for the first budget year under PFS by adding the following to the top of the range (not to its Base Year Expense Level, as in paragraph (d)(1) of this section):

(i) The increase (decrease) between the Formula Expense Level for the base year and the Formula Expense Level or the first budget year under PFS;

(ii) The sum of the figure equal to the top of the range and the increase (decrease) described in paragraph (d)(2)(i) of this section, multiplied by the local inflation factor. (If the Base Year Expense Level is above the allowable expense level, computed as provided above, the IHA may be eligible for transition funding under § 905.735.)

(3) *Allowable Expense Level for first budget year under PFS for a new project.* A new project of a new IHA or a new project of an existing IHA that the IHA decides to place under a separate ACC, which did not have a sufficient number of units available for occupancy in the base year to have a level of operations representative of a full fiscal year of operation is considered to be a "new project". The AEL for the first budget year under PFS for a "new project" will be based on the AEL for a comparable project, as determined by the HUD Field Office. The IHA may suggest a project or projects it believes to be comparable.

(4) *Allowable Expense Level for budget years after the first budget year under PFS that begins on or after April 1, 1986.* For each budget year after the first budget year under PFS that begin on or after April 1, 1986, the AEL shall be computed as follows:

(i) The allowable expense level shall be increased by any increase to the AEL approved by HUD under § 905.720(c);

(ii) The AEL for the current budget year also shall be increased (or decreased) by either:

(A) If the IHA has not experienced a change in the number of its units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on paragraph (d)(4)(ii)(B) of this section, the AEL shall be increased by one-half of one percent (.5 percent); or

(B) If the IHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph

(d)(4)(ii)(B), it shall use the increase (decrease) between the Formula Expense Level for the current budget year and the Formula Expense Level for the requested budget year. The IHA characteristics that shall be used to compute the Formula Expense Level for the current budget year shall be the same as those that were used for the requested budget year when the last adjustment to the AEL was made based on this paragraph (d)(4)(ii)(B), except that the number of interim years in which the .5 percent adjustment was made under paragraph (d)(4)(ii)(A) shall be added to the average age that was used for the last adjustment; and

(iii) The amount computed in accordance with paragraphs (d)(4) (i) and (ii) of this section shall be multiplied by the local inflation factor.

#### Example

*FY 1987.* Assume that: (1) The IHA has experienced no change in the number of its units, (2) the AEL for the IHA's FY 1986 is \$64.00, and (3) the applicable local inflation factor is 6 percent (expressed as 1.06). The AEL for FY 1987 is \$68.18, computed as follows:

1. Allowable Expense Level for FY 1986.....	\$64.00
2. Delta: Increase (or Decrease) in Formula Expense Level (\$64.00 × .5 percent).....	.32
3. Sum (line 1 plus line 2).....	64.32
4. Local Inflation Factor.....	1.06
5. Allowable Expense Level for FY 1987 (line 3 multiplied by line 4).....	\$68.18

*FY 1988.* Assume that the IHA has deprogramed (e.g., demolished or sold) a project that represents seven percent of its units, and that the last time an adjustment to the AEL was made based on paragraph (d)(4)(ii)(B) was in its FY 1985, at which time the IHA had the following characteristics for its requested budget year: average age of 10 years, average project height of 5 stories, and average unit size of 4 bedrooms. The Formula Expense Level for the current budget year is calculated using 12 years (10 years plus two years in which the standard .5 percent adjustment was used), 5 stories and 4 bedrooms.

Also assume that Formula Expense Level calculated based on these characteristics is \$70.00 and that the IHA average characteristics for the requested budget year are now an average age of 8 years, average project height of 4 stories and average unit size of 2 bedrooms, resulting in a Formula Expense Level for the requested budget year of \$68.00. The Formula Expense Level for the requested budget year, therefore, decreases

by \$2.00. Assuming that the local inflation factor is 4.5 percent (expressed as 1.045), the AEL for FY 1988 is \$69.16, computed as follows:

1. Allowable Expense Level for FY 1987.....	\$68.18
2. Delta (or Decrease) in Formula Expense Level.....	(2.00)
3. Sum (line 1 plus line 2).....	66.18
4. Local Inflation Factor.....	1.045
5. Allowable Expense Level for FY 1988 (line 3 multiplied by line 4).....	\$69.16

It should be noted that the Delta in line 2 of the example reflects the application of the formula weights, constant and local inflation factor for the requested budget year applied first to the IHA characteristics for the current budget year and then to the IHA characteristics for the requested budget year, to determine the respective Formula Expense Levels. The local inflation factor shown on line 4 of the example is the same one used in determining the Formula Expense Levels.

(5) *Allowable Expense Level for budget years after the first budget year under PFS that begins on or after April 1, 1992.* For each budget year after the first budget year under PFS that begins on or after April 1, 1992, the AEL shall be computed as follows:

(i) The Allowable Expense Level shall be increased by any increase to the AEL approved by HUD under § 905.720(c);

(ii) The AEL for the Current Budget Year also shall be adjusted as follows:

(A) Increased by one-half of one percent (.5 percent); and

(B) If the IHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph (d)(5)(ii)(B), it shall use the increase (decrease) between the Formula Expense Level for the Current Budget Year and the Formula Expense Level for the Requested Budget Year. The IHA's characteristics that shall be used to compute the Formula Expense Level for the Current Budget Year shall be the same as those that applied to the Requested Budget Year when the last adjustment to the AEL was made based on paragraph (d)(5)(ii)(B), except that the number of interim years in which the .5 percent adjustment was made under paragraph (d)(5)(ii)(A) shall be added to the average age that was used for the last adjustment.

(iii) The amount computed in accordance with paragraphs (d)(5) (i) and (ii) of this section shall be multiplied by the Local Inflation Factor.

(6) *Adjustment of Allowable Expense Level for budget years after the first budget year under PFS.* HUD may adjust



the AEL of budget years after the first year under PFS under the provisions of § 905.710(b) or § 905.720(c).

**§ 905.715 Computation of utilities expense level.**

(a) *General.* In recognition of the rapid rises which occur in utilities costs, the wide diversity among IHAs as to types of utilities services used and the manner in which utilities payments are allocated between IHAs and tenants, and the fact that utilities rates charged by suppliers are beyond the control of the IHA, the PFS treats utilities expenses separately from other IHA expenses. Utilities expenses are, therefore, excluded from the IHA's allowable expense level and the PFS provides for computation of the amount of operating subsidy for utilities costs based upon a calculated utilities expense of each IHA. Accordingly, the IHA's utilities expense level for the requested budget year shall be computed by multiplying the allowable utilities consumption level (AUCL) per-unit per-month for each utility, determined as provided in paragraph (c) of this section, by the projected utility rate determined as provided in paragraph (b) of this section. The AUCL for space heating utilities will be adjusted after the end of the affected fiscal year pursuant to the instructions of paragraph (d) of this section.

(b) *Utilities rates.* (1) The currently applicable rates, with consideration of adjustments and pass-throughs, in effect at the time the operating budget is submitted to HUD will be used as the utilities rates for the requested budget year, except that, when the appropriate utility commission has, before the date of submission of the operating budget to HUD, approved and published rate changes to be applicable during the requested budget year, the future approved rates may be used as the utilities rates for the entire requested budget year.

(2) If an IHA takes action, such as the well-head purchase of natural gas or administrative appeals or legal action, to reduce the rate it pays for utilities (including water, fuel oil, electricity, and gas), then the IHA will be permitted to retain part of the rate savings during the first 12 months that are attributable to its actions. See paragraph (f) of this section and § 905.730(c).

(c) *Computation of Allowable Utilities Consumption Level.* The Allowable Utilities Consumption Level (AUCL) used to compute the utilities expense level of an IHA for the requested budget year generally will be based upon the availability of consumption data. For project utilities where consumption data are available for the entire rolling base

period, the computation will be in accordance with paragraph (c)(1) of this section. Where data are not available for the entire period, the computation will be in accordance with paragraph (c)(2) of this section, unless the project is a new project, in which case the computation will be in accordance with paragraph (c)(3) of this section. For a project where the IHA has taken special energy conservation measures that qualify for special treatment in accordance with paragraph (g)(1) of this section, the computation of the AUCL may be made in accordance with paragraph (c)(4). The AUCL for all of an IHA's projects is the sum of the amounts determined using all of the paragraphs in this paragraph (c), as appropriate.

(1) *Rolling Base Period System.* For project utilities with consumption data for the entire rolling base period, the AUCL is the average amount consumed per unit per month during the rolling base period, adjusted in accordance with paragraph (d) of this section. The IHA shall determine the average amount of each of the utilities consumed during the rolling base period (*i.e.*, the 36-month period ending 12 months prior to the first day of the requested budget year).

(i) *IHA fiscal years affected.* The rolling base period shall be used to compute the AUCL submitted with the operating budgets.

(ii) An example of a rolling base is as follows:

IHA Fiscal year (affected fiscal year)		Rolling base period	
Beginning	Ending	Begins	Ends
1-1-92	12-31-92 (1st year)	1-1-88	12-31-90
1-1-93	12-31-93 (2nd year)	1-1-89	12-31-91

(2) *Alternative method where data is not available for the entire rolling base period:*

(i) If the IHA has not maintained or cannot recapture consumption data regarding a particular utility from its records for the whole rolling base period mentioned in paragraph (c)(1) of this section, it shall submit consumption data for that utility for the last 24 months of its rolling base period to the HUD Field Office for approval. If this is not possible, it shall submit consumption data for the last 12 months of its rolling base period. The IHA also shall submit a written explanation of the reasons that data for the whole rolling base period is unavailable.

(ii) In those cases where an IHA has not maintained or cannot recapture consumption data for a utility for the

entire rolling base period, comparable consumption for the greatest of either 36, 24, or 12 months, as needed, shall be used for the utility for which the data is lacking. The comparable consumption shall be estimated based upon the consumption experienced during the rolling base period of comparable project(s) with comparable utility delivery systems and occupancy. The use of actual and comparable consumption by each IHA, other than those IHAs defined as new projects in paragraph (c)(3) of this section, will be determined by the availability of complete data for the entire 36-month rolling base period. Appropriate utility consumption records, satisfactory to HUD, shall be developed and maintained by all IHAs so that a 36-month rolling average utility consumption per unit per month under paragraph (c)(1) of this section can be determined.

(iii) If an IHA cannot develop the consumption data for the rolling base period or for 12 or 24 months of the rolling base period, either from its own project(s) data, or by using comparable consumption data the actual per-unit per-month utility expenses stated in paragraph (e) of this section shall be used as the utilities expense level and no change factor shall be applied.

**(3) Computation of Allowable Utilities Consumption Levels for New Projects.**

(i) A new project, for the purpose of establishing the rolling base period and the utilities expense level, is defined as either:

(A) A project that had not been in operation during at least 12 months of the rolling base period, or a project that enters management after the rolling base period and before the end of the requested budget year, or

(B) A project that during or after the rolling base period, has experienced conversion from one energy source to another; interruptible service; deprogramed units, a switch from tenant-purchased to IHA-supplied utilities; or a switch from IHA-supplied to tenant-purchased utilities.

(ii) The actual consumption for new projects shall be determined so as not to distort the rolling base period in accordance with a method prescribed by HUD.

**(4) Freezing the Allowable Utilities Consumption Level.**

(i) Notwithstanding the provisions of paragraphs (c)(1) and (c)(2), if an IHA undertakes energy conservation measures that are approved by HUD under paragraph (g) of this section, the AUCL for the project and the utilities involved may be frozen during the



contract period. Before the AUCL is frozen, it shall be adjusted to reflect any energy savings resulting from the use of any HUD funding. The AUCL is then frozen at the level calculated for the year during which the conservation measures initially will be implemented, as determined in accordance with paragraph (g) of this section.

(ii) See § 905.730(c)(2)(ii) for the method of adjusting the AUCL for heating degree days.

(iii) If the AUCL is frozen during the contract period, the annual three-year rolling base procedures for computing the AUCL shall be reactivated after the IHA satisfies the conditions of the contract. The three years of consumption data to be used in calculating the AUCL after the end of the contract period will be as follows:

(A) *First year:* The energy consumption during the year before the year in which the contract ended and the energy consumption for each of the two years before installation of the energy conservation improvements;

(B) *Second year:* The energy consumption during the year the contract ended, energy consumption during the year before the contract ended, and energy consumption during the year before installation of the energy conservation improvements;

(C) *Third year:* The energy consumption during the year after the contract ended, energy consumption during the year the contract ended, and energy consumption during the year before the contract ended.

(d) *Adjustment to utilities used for space heating.* For project utilities with consumption data for the entire rolling base period, and for new projects, consumption of utilities used for space heating shall be adjusted, after the end of the affected year, using a change factor as follows:

(1) *Adjustment of the rolling base period data.—(i) Use of Change Factors.* A change factor will be developed each year by HUD that indicates the relationship of the affected IHA fiscal year Heating Degree Days (HDD) to the average HDD of the rolling base period. This change factor is to be used to establish an AUCL for utilities used for space heating which reflects the severity of the winter weather of the affected IHA fiscal year. The change factors are developed by the National Climatic Center of the Department of Commerce for each established standard weather division of the country, by IHA fiscal year. Change factors will be supplied by HUD to the IHAs. When a change factor is greater than 1.000, it means that the HDD of the affected fiscal year were greater than the average annual HDD of

the rolling base period. An example of the effect of the change factor on the rolling base period consumption is:

#### Assume

Affected fiscal year HDD—5,250

Rolling Base Period average HDD—5,000

Rolling Base Period average annual consumption for heating purposes—1,000 gallons

#### Results

Change Factor is (5,250 divided by 5,000)=1.050

Adjusted Rolling Base Period average consumption for heating purposes (1,000 × 1.050)=1,050 gallons

(ii) *Application of Change Factor to Consumption of the Rolling Base Period.*

The change factor is to be applied only to the consumption readings of meters of utilities, or gallons of oil, or tons of coal used for the purpose of generating heat for dwelling units and other IHA associated buildings. The change factor shall not be applied to the consumption readings of meters of utilities not used for the purpose of generating heat; e.g., water and sewer or electricity used solely for non-heating purposes. The change factor shall be applied to the total consumption reading of meters of utilities, or gallons of oil, or tons of coal used for heating even though the same meter or same energy source are used for other purposes; e.g., heating and cooking gas usage metered on the same meter or oil used for space heating and also heating of water. Such consumption for each fiscal year of the rolling base period shall be adjusted by the change factor. The adjusted consumption for each year shall be totalled. These totals then will be averaged. The consumption readings of meters of utilities not used for heating (not adjusted by the change factor) shall be included in the total consumption.

#### EXAMPLE SHOWING APPLICATION OF CHANGE FACTOR

	Base years		
	1st year	2nd year	3rd year
Gas meters used for heating:			
No. 1234 (In therms)...	15,000	18,000	17,000
No. 2345 .....	10,000	12,000	11,000
Subtotal .....	25,000	30,000	28,000
Change factor (from HUD) .....	x1.050	x1.050	x1.050
Subtotal .....	26,250	31,500	29,400
Gas meters not used for heating:			
No. 3456 .....	2,500	2,600	2,650

#### EXAMPLE SHOWING APPLICATION OF CHANGE FACTOR—Continued

	Base years		
	1st year	2nd year	3rd year
Total adjusted allowable gas consumption level .....	28,750	34,100	32,050

IHAs will be required to use change factors of less than 1.000. Change factors are listed by county. If an IHA manages units in more than one county and those counties have different change factors, the above calculation shall be done considering the units in each county and each county's assigned change factor. If an IHA manages units in an independent city not within the jurisdiction of a county, it shall:

(A) If within one county, use that county's change factor; or

(B) If the city abuts more than one county, use the average of the change factors of the contiguous counties.

(2) *Adjusted Consumption for New Projects.—(i) Use of Change Factor.* For new projects, the IHA shall apply the change factor to the HUD approved consumption level of utilities used for heating.

(ii) *Application of Change Factor to Consumption of New Projects.* The annual AUCL for new projects shall be adjusted by applying the change factor to the estimated consumption where the utility is used for heating in part or in total. This consumption shall be from a comparable project during the permissible rolling base period. Any other consumption of this utility which is not used for heating shall not be adjusted by the change factor, but the estimated annual consumption based upon data from a comparable project during the permissible rolling base period shall be added to the adjusted consumption.

(e) *Utilities Expense Level Where Consumption Data for the Full Rolling Base Period is Unavailable.* If an IHA does not obtain the consumption data for the entire rolling base period, or for 12 or 24 months of the rolling base period, either for its own project(s) or by using comparable consumption data as required in paragraph (c)(2) of this section, it shall request HUD Field Office approval to use actual per-unit per-month utility expenses. These expenses shall exclude utilities labor and other utilities expenses. The actual per-unit per-month utility expenses shall be taken from the year-end statement of operating receipts and expenditures



Form HUD-52599 (Office of Management and Budget approval number 2577-0067), prepared for the IHA fiscal year which ended 12 months before the beginning of the IHA requested budget year (e.g., for an IHA fiscal year beginning January 1, 1983, the IHA would use data from the fiscal year ended December 31, 1981). No change factor shall be applied to actual per-unit per-month utility expenses, and subsequent adjustments will not be approved for a budget year for which the utility expense level is established based upon actual per-unit per-month utility expenses.

(f) *Adjustments.* IHAs shall request adjustments of utilities expense levels in accordance with § 905.730(c), which requires an adjustment based upon a comparison of actual experience and estimates of consumption (after adjustment for heating degree days in accordance with paragraph (d) of this section) and of utility rates.

(g) *Incentives for energy conservation improvements.* If an IHA undertakes energy conservation measures (including measures to save water, fuel oil, electricity, and gas) that are financed by an entity other than the Secretary, such as physical improvements financed by a loan from a utility or governmental entity, management of costs under a performance contract, or a shared savings agreement with a private energy service company, the IHA may qualify for one of two possible incentives under this part. For an IHA to qualify for these incentives, HUD approval shall be obtained. Approval will be based upon a determination that payments under the contract can be funded from the reasonably anticipated energy cost savings, and the contract period does not exceed 12 years.

(1) If the contract allows the IHA's payments to be dependent on the cost savings it realizes, the IHA shall use at least 50 percent of the cost savings to pay the contractor. With this type of contract, the IHA may take advantage of a frozen AUCL under paragraph (c)(4) of this section, and it may use the full amount of the cost savings, as described in § 905.730(c)(2)(ii).

(2) If the contract does not allow the IHA's payments to be dependent on the cost savings it realizes, then the AUCL will continue to be calculated in accordance with paragraphs (c)(1) through (c)(3) of this section, as appropriate; the IHA will be able to retain part of the cost savings, in accordance with § 905.730(c)(2)(i); and the IHA will qualify for additional operating subsidy eligibility (above the amount based on the allowable expense level) to cover the cost of amortizing the

improvement loan during the term of the contract, in accordance with § 905.730(f).

(Information collection requirements contained in paragraph (a) and in paragraph (c)(2)(i) were approved by the Office of Management and Budget under control number 2577-0029)

#### § 905.720 Other costs.

(a) *Costs of Independent audits.* (1) Eligibility to receive operating subsidy for independent audits is considered separately from the PFs. However, the IHA shall not request, nor will HUD approve, an operating subsidy for the cost of an independent audit if the audit has been funded by subsidy in a prior year or the subsidy would create residual receipts after provision for the operating reserve. The IHA's estimate of cost of the independent audit is subject to adjustment by HUD. If the IHA requires assistance in determining the amount of cost to be estimated, the HUD Field office should be contacted.

(2) An IHA that is required by the single Audit Act (see 24 CFR part 44) to conduct a regular independent audit may receive operating subsidy to cover the cost of the audit. The amount shall be prorated between the IHA's development cost budget and its operating budget, as appropriate. The estimated cost of an independent audit, applicable to the operations of IHA-owned rental housing, is not included in the allowable expense level, but it is allowed in full in computing the amount of operating subsidy under § 905.705.

(3) An IHA that is exempt from the audit requirements of the single Audit Act (24 CFR part 44) may receive operating subsidy to offset the cost of an independent audit chargeable to operations (after the end of the initial operating period) if the IHA chooses to have an audit.

(b) *Costs Attributable to Units Approved for Deprogramming and Vacant.* Units approved for deprogramming are those for which the IHA's formal request has been approved by HUD but for which deprogramming has not been completed. Costs for these units may be eligible for inclusion, but shall be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs attributable to units temporarily unavailable for occupancy because they are utilized for IHA related activities are not eligible for inclusion. In determining the PFS operating subsidy, these units shall not be included in the calculation of unit months available. Units approved for deprogramming shall be listed by the IHA and supporting documentation

regarding direct costs attributable to such units shall be included as part of the operating budget in which the IHA requests operating subsidy for these units. If the IHA requires assistance in this matter, the HUD Field office should be contacted.

(c) *Costs attributable to changes in Federal law or regulation.* In the event that HUD determines that enactment of a Federal law or revision in HUD or other Federal regulation has caused or will cause a significant increase in expenditures of a continuing nature above the allowable expense level and utilities expense level, and upon a determination that sufficient other funds are not available to cover the required expenditures, HUD may in HUD's sole discretion decide to prescribe a procedure under which the IHA may apply for or may receive an increase in operating subsidy.

(d) *Costs beyond the control of the IHA.* Costs attributable to unique circumstances that are beyond the control of the IHA and were not reflected in the IHA's Base Year Expense Level may be considered for supplemental operating subsidy funding. Where costs were reflected in the IHA's Base Year Expense Level, but the rate of increase for such costs is greater than the prescribed PFS inflation rate(s), then the increase in excess of that provided by the inflation rate may be considered for supplemental operating subsidy funding. The IHA shall submit to the HUD Field Office complete documentation relating to those cost items which it claims to be beyond its control. Such documentation shall not be submitted as part of the requested operating budget, but shall be submitted separately as an addendum to the budget. The IHA also shall show that these additional costs cannot be funded from its own resources. In the event that excess funds are available after making all payments approvable under §§ 990.705 and 905.720 of these regulations, HUD may, in HUD's sole discretion, solicit, evaluate and approve or disapprove, in full or in part, these requests for additional operating subsidy for costs beyond the control of the IHA.

(e) *Costs resulting from combination of two or more units.* When an IHA redesigns or rehabilitates a project and combines two or more units into one larger unit and the combination of units results in a unit that houses at least the same number of people as were previously served, the AEL for the requested year shall be multiplied by the number of unit months not included in the requested year's unit months



available as a result of these combinations that have occurred since the Base Year. The number of people served in a unit will be based on the formula  $[(2 \times \text{No. of bedrooms}) \text{ minus } 1]$ , which yields the average number of people that would be served. An efficiency unit will be counted as a one bedroom unit for purposes of this calculation.

(Approved by the Office of Management and Budget under OMB control number 2577-0029)

#### § 905.725 Projected operating income level.

(a) *Policy.* PFS determines the amount of operating subsidy for a particular IHA based in part upon a projection of the actual dwelling rental income and other income for the particular IHA. The projection of dwelling rental income is obtained by computing the average monthly dwelling rental charge per unit for the IHA, and projecting this amount for the requested budget year by applying an upward trend factor (subject to updating) of 3 percent, and multiplying this amount by the projected occupancy percentage for the requested budget year. Nondwelling income is projected by the IHA subject to adjustment by HUD. There are special provisions for projection of dwelling rental income for new projects.

(b) *Computation of projected average monthly dwelling rental income.* The projected average monthly dwelling rental income per unit for the IHA is computed as follows:

(1) *Average monthly dwelling rental charge per unit.* The dollar amount of the average monthly dwelling rental charge per unit shall be computed on the basis of the total dwelling rental charges (total of the adjusted rent roll amounts) for all project units, as shown on the rent roll control and analysis of dwelling rent charges, which the IHA is required to maintain, for the first day of the month which is six months before the first day of the requested budget year, except that if a change in the total of the rent rolls has occurred in a subsequent month which is before the beginning of the requested budget year and before the submission of the requested budget year operating budget, the IHA shall use the latest changed rent roll for the purpose of the computation. This aggregate dollar amount shall be divided by the number of occupied dwelling units as of the same date.

(2) *Three percent increase.* The average monthly dwelling rental charge per unit, computed under paragraph (b)(1) of this section, is increased by 3 percent to obtain the projected average monthly dwelling rental charge per unit

of the IHA for the requested budget year.

(3) *Projected occupancy percentage.* The IHA shall determine its projected percentage of occupancy for all project units (projected occupancy percentage) as follows:

(i) *High occupancy IHAs.* If the IHA's actual occupancy percentage (see § 905.760) is equal to or greater than 97 percent, the IHA's projected occupancy percentage is 97 percent.

(ii) *High occupancy IHAs exclusive of scheduled modernization.* If the IHA's actual occupancy percentage (see § 905.760) is less than 97 percent solely because of vacant, on-schedule modernization units described in paragraph (v) below, the IHA's projected occupancy percentage is its actual occupancy percentage. An IHA may also use its actual occupancy percentage as its projected occupancy percentage if the IHA has five or fewer vacant units other than vacant, on-schedule modernization units described in paragraph (v) below.

(iii) *Low occupancy IHAs with an approved Comprehensive Occupancy Plan (COP).* If the IHA has an actual occupancy percentage (see § 905.760) less than 97 percent and more than five vacant units, not solely because of vacant, on-schedule modernization units described in paragraph (v) below and if the IHA has a HUD-approved COP, the IHA's projected occupancy percentage is determined under § 905.770(h).

(iv) *Low Occupancy IHAs without an approved COP.* (A) The IHA shall use 97 percent as its projected occupancy percentage, if the IHA:

(1) Has an actual occupancy percentage (see § 905.760) less than 97 percent and has more than five vacant units, not solely because of vacant, on-schedule modernization units described in paragraph (v) below; and the IHA:

(2)(i) Has completed the term of its approved COP but has not achieved a 97 percent actual occupancy percentage or has not had five or fewer vacant units other than vacant, on-schedule modernization units described in paragraph (v) below, or

(ii) Is authorized to submit a COP but elects not to submit one, or

(iii) submits a COP that is disapproved by HUD.

(B) Notwithstanding the requirement in paragraph (b)(3)(iv)(A) that 97 percent be the projected occupancy percentage, a low occupancy IHA which satisfies all the conditions described in paragraph (b)(3)(iv)(A)(2)(i) above, may adjust the 97 percent projected occupancy percentage to discount units that are vacant for reasons beyond its control, as provided in § 905.770(i).

(v) *Vacant, on-schedule modernization units.* Vacant, on-schedule modernization units are vacant units in an otherwise occupiable project that has received funding for modernization through the comprehensive improvement assistance program (subpart I) or other sources; and for which

(A) It is expected that the vacant units will be occupied on completion of modernization work;

(B) The IHA has a schedule for carrying out the modernization which is acceptable to HUD; and

(C) The modernization work is on schedule.

(4) *Projected average monthly dwelling rental income.* The projected occupancy percentage under paragraph (b)(3) of this section shall be multiplied by the projected average monthly dwelling rental charge under paragraph (b)(2) of this section to obtain the projected monthly dwelling rental income per unit.

(c) *Projected average monthly dwelling rental charge per unit for new projects.* The projected average monthly dwelling rental charge for new projects that were not available for occupancy during the budget year before the requested budget year and which will reach the end of the initial operating period (EIOP) within the first nine months of the requested budget year, shall be calculated as follows:

(1) If the IHA has another project or projects under management which are comparable in terms of elderly and nonelderly tenant composition, the IHA shall use the projected average monthly dwelling rental charge for such project or projects.

(2) If the IHA has no other projects which are comparable in terms of elderly and nonelderly tenant composition, the HUD Field Office will provide the projected average monthly dwelling rental charge for such project or projects, based on comparable projects located in the area.

(d) *Estimate of additional dwelling rental income.* After implementation of the provisions of any legislation enacted or any HUD administrative action taken after the effective date of these regulations, which affects rent paid by tenants of projects, each IHA shall submit a revision of its annual operating budget showing an estimate of any change in rental income which it anticipates as the result of the implementation of said provisions. HUD shall have complete discretion to adjust the projected average monthly dwelling rental charge per unit to reflect the IHA's estimate of change or, in the



absence of this submission, to reflect HUD's estimate of such change. HUD also shall have complete discretion to reduce or increase the operating subsidy approved for the IHA current fiscal year in an amount equivalent to the change in the rental income.

(e) *IHA's estimate of income other than dwelling rental income*—(1) *Investment income.* IHAs with an estimated average cash balance of less than \$20,000, excluding investment income earned from a funded replacement reserve under § 905.666(f), shall make a reasonable estimate of investment income for the Requested Budget Year. IHAs with an estimated average cash balance of \$20,000 or more, excluding investment income earned from a funded replacement reserve under § 905.666(f), shall estimate interest on general fund investments based on the estimated average yield for 91-day Treasury bills for the IHA's Requested Budget Year (yield information will be provided by HUD). The determination of average cash balance will allow a deduction of \$10,000, plus \$10 per unit for each unit over 1,000, subject to a total maximum deduction of \$250,000. In all cases, the estimated investment income amount shall be subject to HUD approval. (See § 905.730(b).)

(2) *Other Income.* All IHAs shall estimate other income based on past experience and a reasonable projection for the requested budget year, which estimate shall be subject to HUD approval.

(3) *Total.* The estimated total amount of income from investments and other income, as approved, shall be divided by the number of unit months available to obtain a per-unit per-month amount. Such amount shall be added to the projected average dwelling rental income per unit to obtain the projected operating income level. This amount shall not be subject to the provisions regarding program income in 24 CFR 85.25.

(f) *Required adjustments to estimates.* The IHA shall submit year-end adjustments of projected operating income levels in accordance with § 905.730(b), which covers investment income.

(Information collection requirements contained in paragraphs (e) and (f) were approved by the office of Management and Budget under control number 2577-0029)

#### § 905.730 Adjustments.

Adjustment information submitted to HUD under this section shall be accompanied by an original or revised operating budget.

(a) *Adjustment of Base Year Expense Level.*—(1) *Eligibility.* An IHA with

projects that have been in management for at least one full fiscal year, for which operating subsidy is being requested under the formula for the first time, may, during its first budget year under PFS, request HUD to increase its Base Year Expense Level. Included in this category are existing IHAs requesting subsidy for a project or projects in operation at least one full fiscal year under separate ACC for which operating subsidy has never been paid, except for IPA audit costs. This request may be granted by HUD, in its discretion, only where the IHA establishes to HUD's satisfaction that the Base Year Expense Level computed under § 905.710(a) will result in operating subsidy at a level insufficient to support a reasonable level of essential services. The approved increase cannot exceed the per-unit per-month amount by which the top of the range exceeds the Base Year Expense Level or \$10.31.

(2) *Procedure.* An IHA that is eligible for an adjustment under paragraph (a)(1) of this section may only make a request for such adjustment once for projects under a particular ACC, at the time it submits the operating budget for the first budget year under PFS. Such request shall be submitted to the HUD Field Office, which will review, modify as necessary, and approve or disapprove the request. A request under this paragraph shall include a calculation of the amount per-unit per-month of requested increase in the Base Year Expense Level, and shall show the requested increase as a percentage of the Base Year Expense Level.

(b) *Adjustments to estimated investment income.* An IHA that has an estimated average cash balance of at least \$20,000 shall submit a year-end adjustment to the estimated amount of investment income that was used to determine subsidy eligibility at the beginning of the IHA's fiscal year. The amount of the adjustment will be the difference between the estimate and a target investment income amount based on the actual average yield on 91-day Treasury bills for the IHA's fiscal year being adjusted and the actual average cash balance available for investment during the IHA's fiscal year, computed in accordance with HUD requirements. HUD will provide the IHA with the actual average yield on 91-day Treasury bills for the IHA's fiscal year. Failure of an IHA to submit the required adjustment of investment income by the date due may, in the discretion of HUD, result in the withholding of approval of future obligation of operating subsidies until the adjustment is received.

(c) *Adjustments to Utilities Expense Level.* An IHA receiving operating

subsidy under § 905.705, excluding those IHAs that receive operating subsidy solely for IPA audit (§ 905.720(a)), shall submit a year-end adjustment regarding the utility expense level approved for operating subsidy eligibility purposes. This adjustment, which will compare the actual utility expense and consumption for the IHA fiscal year to the estimates used for subsidy eligibility purposes, shall be submitted on forms prescribed by HUD. This request shall be submitted to the HUD Field Office by a deadline established by HUD, which will be during the IHA fiscal year following the IHA fiscal year for which an operating subsidy was received by the IHA, exclusive of a subsidy solely for IPA audit costs. Failure to submit the required adjustment of the utilities expense level by the due date may, in the discretion of HUD, result in the withholding of approval of future obligation of operating subsidies until it is received. Adjustments under this subsection normally will be made in the IHA fiscal year following the year for which the adjustment is applicable, except as provided in paragraph (c)(5) of this section or unless a repayment plan is necessary as noted in paragraph (d) of this section.

(1) *Rates.* (i) A decrease in the utilities expense level because of decreased utility rates—to the extent funded by operating subsidy—will be deducted by HUD from future operating subsidy payments. However, where the rate reduction covering utilities, such as water, fuel oil, electricity, and gas, is directly attributable to action by the IHA, such as well-head purchase of natural gas, or administrative appeals or legal action (beyond normal public participation in ratemaking proceedings), 50 percent of the decrease will be retained by the IHA for the 12-month period following the decrease (and the other 50 percent will be deducted from operating subsidy otherwise payable).

(ii) An increase in the utilities expense level because of increased utility rates—to the extent funded by operating subsidy—will be fully funded by residual receipts, if available during that fiscal year, or by increased operating subsidy, subject to availability of funds.

(2) *Consumption.* (i) Generally, 50 percent of any decrease in the utilities expense level attributable to decreased consumption (adjusted for heating degree days in accordance with § 905.715(d)), after adjustment for any utility rate change, will be retained by the IHA; 50 percent will be offset by HUD against subsequent payment of operating subsidy.



(ii) However, in the case of an IHA whose energy conservation measures have been approved by HUD as satisfying the requirements of § 905.715(g)(1), the IHA may retain 100 percent of the savings from decreased consumption after payment of the amount due the contractor until the term of the financing agreement is completed. The decreased consumption is to be determined using a heating degree day adjustment for space heating utilities and by adjusting for any utility rate changes. The heating degree day experience during the frozen rolling base period will be used instead of the degree days in the year being adjusted. The documentation on the degree days shall be supplied by the IHA and is subject to HUD approval. The savings realized shall be applied in the following order:

(A) Retention of up to 50 percent of the total savings from decreased consumption to cover training of IHA employees, counseling of tenants, IHA management of the cost reduction program and any other eligible costs; and

(B) Prepayment of the amount due the contractor under the contract.

(iii) An increase in the Utilities Expense Level attributable to increased consumption will be fully funded by residual receipts after provision for reserves, if available. If residual receipts are not available and the increase would result in a reduction of the operating reserve below the authorized maximum, then 50 percent of the amount will be funded by increased operating subsidy payments, subject to the availability of funds.

(3) *Emergency adjustments.* In emergency cases, where an IHA establishes to HUD's satisfaction that a severe financial crisis would result from a utility rate increase, an adjustment covering only the rate increase may be submitted to HUD at any time during the IHA's current Budget Year. Unlike the adjustments mentioned in paragraphs (c)(1) and (c)(2) of this section, this adjustment shall be submitted to the HUD Field office by revision of the original submission of the estimated Utility Expense Level for the fiscal year to be adjusted.

(4) *Documentation.* Supporting documentation substantiating the requested adjustments shall be retained by the IHA pending HUD audit.

(d) *Requests for adjustments to projected average monthly dwelling rental income.* Requests for adjustments to projected average monthly dwelling rental income may be made as follows:

(1) *Criteria for granting request.* An IHA may request an adjustment to projected average monthly dwelling

rental income under PFS if the IHA can establish to HUD's satisfaction that the projected amount computed under § 905.725 was not attained because of circumstances beyond the control of the IHA, such as a substantial increase in general unemployment in the locality, or because of a revision of the IHA's rent schedule which has been approved by HUD. The IHA shall also demonstrate to HUD's satisfaction that it has established and is effectively implementing tenant selection criteria in compliance with HUD requirements. HUD shall have complete discretion to approve completely, approve in part or deny any requested adjustments to projected average monthly dwelling rental income.

(2) *Procedure.* A request for an adjustment under this subsection shall be submitted to the HUD Field Office by a deadline established by HUD, which will be within twelve months following the IHA's fiscal year being adjusted. In emergency cases, however, where an IHA establishes to HUD's satisfaction that decreased rental income would result in a severe financial crisis, a request for adjustments may be submitted to HUD at an earlier time.

(e) *Energy conservation financing.* If HUD has approved an energy conservation contract under § 905.715(g)(2), then the IHA is eligible for additional operating subsidy each year of the contract to amortize the cost of the energy conservation measures under the contract, subject to a maximum annual limit equal to the cost savings for that year (and a maximum contract period of 12 years).

(1) Each year, the energy cost savings would be determined as follows:

(i) The consumption level that would have been expected if the energy conservation measure had not been undertaken would be adjusted for the Heating Degree Days experience for the year, and for any change in utility rate.

(ii) The actual cost of energy (of the type affected by the energy conservation measure) after implementation of the energy conservation measure would be subtracted from the expected energy cost, to produce the energy cost savings for the year. (See also paragraph (c)(2)(ii) of this section for retention of consumption savings.)

(2) If the cost savings for any year during the contract period is less than the amount of operating subsidy to be made available under this paragraph (e) to pay for the energy conservation measure in that year, the deficiency will be offset against the IHA's operating subsidy eligibility for the IHA's next fiscal year.

(3) If energy cost savings are less than the amount necessary to meet amortization payments specified in a contract, the contract term may be extended (up to the 12-year limit) if HUD determines that the shortfall is the result of changed circumstances rather than a miscalculation or misrepresentation of projected energy savings by the contractor or IHA. The contract term may only be extended to accommodate payment to the contractor and associated direct costs.

(f) *Formal review process (1992)-(1) Eligibility for consideration.* Any IHA with an established Allowable Expense Level may request to use a revised Allowable Expense Level for its requested budget year that starts on or after April 1, 1992 (and ends during calendar year 1993).

(2) *Eligibility for adjustment.* (i) If an IHA's AEL for the budget year that ends during calendar year 1992 is either less than 85 percent of the Formula Expense Level or more than 115 percent of the Formula Expense Level, as calculated using the revised formula and the characteristics for the IHA and its community, then the IHA's AEL for the budget year that ends during calendar year 1993 is subject to adjustment at the IHA's request. The revised formula expense level for the fiscal year ending during calendar year 1992 is the IHA's value of the following formula, after updating by the local inflation factors from FY 1989 to the requested budget year.

(ii) The revised formula is the sum of the following six numbers:

(A) *The number of pre-1940 rental units occupied by poor households in 1980 as a percentage of the 1980 population of the community multiplied by a weight of 7.954.* This Census-based statistic applies to the county of the IHA, except that, if the IHA has 80 percent or more of its units in an incorporated city of more than 10,000 persons, it uses city-specific data. County data will exclude data for any incorporated cities of more than 10,000 persons within its boundaries.

(B) *The Local Government Wage Rate multiplied by a weight of 116.496.* The wage rate used is a figure determined by the Bureau of Labor statistics. It is a county-based statistic, calibrated to a unit-weighted IHA standard of 1.0. For multi-county IHAs, the local government wage is unit-weighted. For this formula, the local government wage index for a specific county cannot be less than 85 percent or more than 115 percent of the average local government wage for counties of comparable population and metro/non-metro status, on a state-by-



state basis. In addition, for counties of more than 150,000 population in 1980, the local government wage cannot be less than 85 percent or more than 115 percent of the wage index of private employment determined by the Bureau of Labor Statistics and the rehabilitation cost index of labor and materials determined by the R.S. Means Company.

(c) *The lesser of the current number of the IHA's two or more bedroom units available for occupancy, or 15,000 units, multiplied by a weight of .002896.*

(D) *The current ratio of the number of the IHA's two or more bedroom units available for occupancy in high-rise family projects to the number of all the IHA's units available for occupancy multiplied by a weight of 37.294.* For this indicator, a high-rise family project is defined as averaging 1.5 or more bedrooms per unit available for occupancy and averaging 35 or more units available for occupancy per building and containing at least one building with units available for occupancy that is 5 or more stories high.

(E) *The current ratio of the number of the IHA's three or more bedroom units available for occupancy to the number of all the IHA's units available for occupancy multiplied by a weight of 22.303.*

(F) *An equation calibration constant of .2344.*

(3) *Procedure.* If an IHA wants to request a revision to its AEL, it should determine whether its AEL for the fiscal year ending in calendar year 1992 (for purposes of this section, the "unrevised AEL") is either less than 85 percent of the Formula Expense Level or more than 115 percent of the Formula Expense Level. Then, in lieu of using the unrevised AEL as the basis for developing the IHA's AEL and operating budget for the fiscal year ending in calendar year 1993, the IHA will use 85 percent of the FEL (if this is higher than the unrevised AEL) or 115 percent of the FEL (if this is lower than the unrevised AEL). If an IHA has submitted its original operating budget before the publication of a change to the PFS handbook containing forms and instructions necessary to implementation of this regulatory change, the IHA shall submit a revision to its operating budget with calculations based on the new AEL within 60 days of the publication of the handbook change. If an IHA requests such revision of its AEL in connection with submission of an operating budget and its current AEL is within 85 to 115 percent of the FEL, HUD will not adjust the AEL. If an IHA requests revision and its AEL is not within 85 to 115 percent of the FEL, HUD will increase it to 85 percent or decrease

it to 115 percent. The revised Allowable Expense Levels approved by HUD will be put into effect for the IHA's budget year that begins on or after April 1, 1992 (and thus ends in calendar year 1993).

(g) *Additional HUD-initiated adjustments.* Notwithstanding any other provisions of this subpart, HUD may at any time make an upward or downward adjustment in the amount of the IHA's operating subsidy as result of data subsequently available to HUD which alters projections upon which the approved operating subsidy was based. Normally adjustments shall be made in total in the IHA fiscal year in which the needed adjustment is determined; however, if a downward adjustment would cause a severe financial hardship on the IHA, the HUD Field office may establish a recovery schedule which represents the minimum number of years needed for repayment.

(Approved by the Office of Management and Budget under control number 2577-0029)

#### **§ 905.735 Transition funding for excessive high-cost IHAs.**

If an IHA's Base Year Expense Level exceeds its allowable expense level, computed as provided in § 905.710, for any budget year under PFS, the IHA may be eligible for transition funding. Transition funding shall be an amount not to exceed the difference between the Base Year Expense Level and the allowable expense level for the requested budget year, multiplied by the number of units months available. HUD shall have the right to discontinue payment of all or part of the transition funding in the event HUD at any time determines that the IHA has not achieved a satisfactory level of management efficiency, or is not making efforts satisfactory to HUD to improve its management performance.

#### **§ 905.740 Operating reserves.**

(a) *Use of operating reserves.* HUD will not approve an operating budget or operating budget revision which proposes to use operating reserve funds that would cause the reserve balance to fall below 40 percent of the maximum operating reserve for the requested budget year, unless the IHA fully documents that such decreased reserve level will be sufficient to meet the working capital needs of the IHA. If operating reserves are used in excess of the amount approved by HUD in the operating budget, HUD is not obligated to provide additional operating subsidy to restore such funds.

(b) *Augmentation of the operating reserve.* The PFS does not specifically provide operating subsidy to augment the IHA's operating reserve. However,

the full amount of the IHA's operating subsidy eligibility may be provided to the IHA, and some part or all of this amount may be used to augment the operating reserve as long as the estimated year-end reserve balance, as shown in the approved operating budget for the year for which the funds are requested, does not exceed the maximum operating reserve amount as shown in the same operating budget.

#### **§ 905.745 Operating budget submission and approval.**

(a) *Required board resolution.* In addition to other budget documentation required by HUD, each operating budget or operating budget revision submitted to HUD in accordance with the provisions of PFS shall include a certified copy of a resolution of the board of commissioners stating that the board has reviewed and approved the operating budget or operating budget revision and has found:

(1) That the proposed expenditures are necessary in the efficient and economical operation of the housing for the purpose of serving low income families.

(2) That the financial plan is reasonable in that:

(i) It indicates a source of funding adequate to cover all proposed expenditures.

(ii) It does not provide for use of Federal funding in excess of that payable under the provisions of these regulations.

(3) That all proposed rental charges and expenditures will be consistent with provisions of law and the annual contributions contract.

(b) *HUD limited operating budget review.* Detailed HUD review of the operating budgets or operating budget revisions normally will be limited to the prescribed PFS forms. Under this procedure, although the operating budget normally will not be reviewed in depth, the operating reserve calculation in all cases will be examined and budget modifications will be made where the operating reserve provisions are not in accordance with HUD requirements. In addition, if the HUD Field Office finds that an operating budget is incomplete, includes illegal or ineligible expenditures, mathematical errors or errors in the application of accounting procedures, or is otherwise unacceptable, the HUD Field Office shall modify or disapprove the operating budget. The HUD Field Office may at any time require the submission by the IHA of further information regarding an operating budget or operating budget revision.



(c) *Withdrawal by HUD of limited operating budget review.* HUD reserves the right at any time to deviate from the limited operating budget review provided in paragraph (b) of this section if HUD finds that the IHA is operating its program in a manner which threatens the future serviceability, efficiency, economy, or stability of the housing that it operates. If such action is deemed necessary, the HUD Field Office will normally notify the IHA before its submission of the operating budget that HUD will subject the operating budget to a detailed review. When the IHA's operation no longer threatens the future serviceability, efficiency, economy or stability of the housing, HUD will notify the IHA that the limited review as provided in paragraph (b) of this section is being reinstated.

(Approved by the Office of Management and Budget under control number 2577-0026)

**§ 905.750 Payment procedure for operating subsidy under PFS.**

(a) *General.* Subject to the availability of funds, payments of operating subsidy under PFS shall be made generally by electronic funds transfers, based on a schedule submitted by the IHA and approved by HUD, reflecting the IHA's projected cash needs. The schedule may provide for several payments per month. If an IHA has an unanticipated, immediate need for disbursement of approved operating subsidy, it may make an informal request to HUD to revise the approved schedule. (Requests by telephone are acceptable.)

(b) *Payments procedure.* In the event that the amount of operating subsidy has not been determined by HUD as of the beginning of an IHA's budget year under these PFS regulations, annual or monthly or quarterly payments of operating subsidy shall be made, as provided in paragraph (a) of this section, based upon the amount of the IHA's operating subsidy for the previous budget year or such other amount as HUD may determine to be appropriate.

(c) *Availability of funds.* In the event that insufficient funds are available to make payments approvable under PFS for operating subsidy payable by HUD, HUD shall have complete discretion to revise, on a pro rata basis or other basis established by HUD, the amounts of operating subsidy to be paid to IHAs.

**§ 905.755 Payments of operating subsidy conditioned upon reexamination of income of families in occupancy.**

(a) *Policy.* The income and composition of each family shall be reexamined at least annually (see § 905.315). IHAs must be in compliance with this reexamination requirement to

be eligible to receive full operating subsidy payments.

(b) *IHAs in compliance with requirements.* Each submission of the original operating budget for a fiscal year shall be accompanied by a certification by the IHA that it is in compliance with the annual income reexamination requirements and that rents have been or will be adjusted in accordance with subpart D of this part.

(c) *IHAs not in compliance with requirements.* Any IHA not in compliance with the annual income reexamination requirement at the time of operating budget submission shall furnish to the HUD Field Office a copy of the procedure it is using to attain compliance and a statement of the number of families that have undergone reexamination during the twelve months preceding the date of the operating budget submission, or the revision thereof. If, on the basis of such submission, or any other information, the Field Office Director determines that the IHA is not substantially in compliance with the annual income reexamination requirement, HUD shall withhold payments to which the IHA might otherwise be entitled under this part, equal to his or her estimate of the loss of rental income to the IHA resulting from its failure to comply with those requirements.

(Information collection requirements contained in this section have been approved by the Office of Management and Budget under control number 2577-0026)

**§ 905.760 Determining Actual Occupancy Percentage.**

For each requested budget year beginning on or after July 1, 1986, the IHA shall determine the percentage of occupancy for all project units included in the unit months available (actual occupancy percentage), at its option, either:

(a) For the last day of the month that ends six months before the beginning of the requested budget year, or

(b) Based on the average occupancy during the month ending six months before the beginning of the requested budget year. If the IHA elects to use an average, it shall maintain a record of its computation of its actual occupancy percentage. The actual occupancy percentage shall be adjusted to reflect expected changes in occupancy because of modernization, new development, demolition or disposition in order to reflect the expected average occupancy rate throughout the year. If, after that date, there are changes, up or down, in occupancy because of modernization, new development, demolition, or disposition not reflected in the

adjustment, the IHA shall submit a budget revision to reflect the actual change in occupancy due to these actions.

**§ 905.770 Comprehensive Occupancy Plan requirements.**

(a) *IHAs that may submit a Comprehensive Occupancy Plan.* An IHA may prepare and submit a COP to HUD in accordance with the provisions of this section:

(1) For its first requested budget year beginning on or after July 1, 1986, if the IHA has an actual occupancy percentage (§ 905.760) less than 97 percent, and has more than five vacant units, not solely because of vacant, on-schedule modernization units (as defined in § 905.725(b)(3)(v)); or

(2) For a requested budget year beginning on or after July 1, 1987, if:

(i) The IHA projects an actual occupancy percentage (§ 905.760) for the requested budget year of less than 97 percent and has more than five vacant units, other than vacant, on-schedule modernization units;

(ii) The IHA is not currently a low occupancy IHA, that is, the IHA had an actual occupancy percentage determined under § 905.760 for the current requested budget year that equalled or exceeded 97 percent or had five or fewer vacant units other than vacant, on-schedule modernization units; and

(iii) The IHA is not currently under a COP.

(b) *Comprehensive Occupancy Plan content.* A COP shall provide a general IHA-wide strategy for returning to occupancy or deprogramming all vacant units and a specific strategy for returning to occupancy or deprogramming units for each project that has an occupancy percentage of less than 97 percent.

(1) The general IHA-wide strategy for returning to occupancy or deprogramming all vacant units shall specify management actions the IHA is taking or intends to take to eliminate vacancies, such as revised occupancy policies, actions to reduce time to return vacated units to occupancy, and identification of the need to use the exception for nonelderly tenants in elderly projects, and shall include a schedule for completing these actions.

(2) The project-specific strategy shall:

(i) Identify each project that has a percentage of occupancy less than 97 percent.

(ii) State the project-specific actions the IHA is taking or intends to take to eliminate vacancies, such as:

(A) Modernization,



- (B) Demolition,
- (C) Disposition,
- (D) Change in occupancy policy, or
- (E) Physical or management improvements; and

(iii) For each project identified, include a schedule for completing these actions and returning the units to occupancy.

(3) The COP shall also include yearly IHA-wide occupancy goals and yearly occupancy goals for each project with an occupancy rate below 97 percent stated for each year until there is a projected IHA-wide occupancy rate of at least 97 percent or an estimate that the IHA will have five or fewer vacant units, excluding units that are vacant, on-schedule modernization units. These goals should reflect the average occupancy percentage for each year. The yearly occupancy goals (both IHA-wide and project specific) for the first year of a COP that is submitted with an IHA's budget for its first requested budget year beginning on or after July 1, 1986, shall take into account actions taken by the IHA from August 2, 1985, to reduce vacancies.

(c) *Time for submitting a Comprehensive Occupancy Plan.* An IHA that submits a COP to HUD for approval in accordance with paragraph (a) of this section shall submit the COP with its budget.

(d) *Maximum term of a Comprehensive Occupancy Plan.* (1) Except as provided in paragraph (d)(2) of this section, a COP:

- (i) Submitted for an IHA's first requested budget year beginning on or after July 1, 1986, shall be for a period approved by HUD as reasonable, which shall not exceed five years; or
- (ii) Submitted for a requested budget year beginning on or after July 1, 1987, shall be for a period of one or two years, as approved by HUD.

(2) A COP that exceeds the maximum period provided in paragraphs (d)(1) (i) or (ii) of this section may be approved only if the Assistant Secretary for Public and Indian Housing has given written authorization for such longer period before the approval of the COP.

(e) *Local governing body review.* The IHA shall have the COP reviewed by the local governing body for comment and shall submit any comments from the local governing body to HUD with the COP.

(f) *HUD review of Comprehensive Occupancy Plan.* If HUD fails to approve, disapprove or otherwise substantively comment on a COP within 45 days of receipt of the plan, the IHA-wide yearly occupancy goal for the first year of the COP shall be considered approved for the purpose of determining

the IHA's projected occupancy percentage under paragraph (h) of this section.

(g) *Projected Occupancy Percentage (Comprehensive Occupancy Plan).* An IHA that has a HUD-approved COP shall use as its projected occupancy percentage for computing its projected operating income level under § 908.725 the greater of its actual occupancy percentage, as determined under § 905.760 or its approved, yearly IHA-wide occupancy goal, adjusted, as necessary, to discount units that are vacant for reasons beyond the IHA's control, as provided in paragraph (i) of this section.

(h) *Units vacant for reasons beyond an IHA's control.* A vacant unit is considered vacant for reasons beyond an IHA's control only if the unit is located in a project that meets one of the following conditions:

(1) The IHA has applied for modernization, HUD cannot fund the project because of lack of sufficient funding, and it is expected that the units will be occupied when the units are modernized.

(2) The vacant units are vacant, on-schedule modernization units.

(3) The units are vacant because of natural disasters, or as a result of court-ordered, or HUD-approved, constraints relating to Title VI of the Civil Rights Act of 1964.

(Information collection requirements were approved by the Office of Management and Budget under control number 2577-0066)

#### **Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances**

##### **§ 905.801 Purpose and applicability.**

(a) *Purpose.* The purpose of this subpart is to implement HUD policies in support of national energy conservation goals by reducing energy consumption, with consequent reduction of operating costs of IHA-owned housing projects, by requiring that IHAs conduct energy audits and undertake certain cost-effective, energy conservation measures. Energy audits will determine what energy conservation measures will be cost-effective and will establish priorities for funding those measures found to be cost-effective. This subpart also provides for the establishment of utility allowances for tenants based on reasonable consumption of utilities by an energy-conscious household.

(b) *Applicability.* The provisions of this subpart apply to all IHAs with IHA-owned housing including Mutual Help and Turnkey III.

#### **Energy Audits and Energy Conservation Measures**

##### **§ 905.805 Requirements for energy audits.**

All IHAs shall complete an appropriate energy audit for each IHA-owned project under management in accordance with the schedule specified in § 905.822. Energy audits shall be conducted by IHA personnel or consultants as appropriate. Standards for energy audits shall be equivalent to State standards for energy audits or as approved by HUD. Energy audits shall analyze all of the energy conservation measures specified in § 905.807 that are pertinent to the type of buildings and equipment operated by the IHA. The objective of each audit shall be to determine the areas, if any, in need of improvements that will reduce the need for energy. For each improvement analyzed, the energy audit shall determine the period of time needed to recover its capital cost. In making this computation, the estimated cost of accomplishing each energy conservation measure shall be divided by the net annual savings estimated from the measure to determine the period, in number of years, needed to recover the cost through savings. For example:

(a) The existing ceiling insulation in a building has a value of R-11. By adding additional insulation to a value of R-22, the annual savings in heating costs will amount to \$1,000.

(b) The cost in installing the additional insulation is estimated to be \$7,500.

(c) The "pay-back" period is: \$7,500/\$1,000 = 7.5 years.

##### **§ 905.807 Energy conservation measures.**

IHAs shall consider the following energy conservation measures and shall conduct an energy audit for each measure if there is reason to believe, based upon age of buildings, etc., that they may be cost-effective:

(a) Installation of individual utility meters. Benefit cost analyses for individual utility meters shall continue to be made in accordance with § 905.842. However, priority for funding of utility meters will be considered on the basis of their pay-back period.

(b) Ceiling insulation.

(c) Insulation of bare hot water or steam pipes.

(d) Caulking and sealants in building joints.

(e) Weatherstripping for doors and windows.

(f) Clock thermostats for units with individual heating controls.

(g) Exterior insulation for hot water heaters located in unheated spaces.



(h) Insulation for air ducts in unheated spaces.

(i) Storm doors and windows, replacement of single glazed windows with double glazed windows.

(j) Replacement of incandescent fixtures in public spaces with higher efficiency lighting.

(k) Flow restrictors for hot water lines to shower heads or faucets.

(l) Thermostatic radiator valves.

(m) Floor insulation over unheated crawl spaces.

(n) Exterior wall insulation.

(o) Improved burners for oil-fired heating equipment.

(p) Improved boiler controls for central, group, or building heating plants.

(q) Separate boilers for domestic hot water in central, group, or building heating plants.

(r) Heat pumps to replace existing electric resistance heating systems.

(s) Capacitors, peak load controllers, time clock controls and other equipment that will lower the cost of electricity.

(t) Other energy conservation measures that an IHA considers may be cost effective.

(u) Solar energy systems. (The pay-back period for these systems shall be calculated by multiplying the amount of the estimated net savings by two. This is because solar energy is renewable and because anticipated cost increases in non-renewable energy are not to be considered in calculating their pay-back period.)

#### § 905.810 Order of funding.

(a) Within the funds available to an IHA, energy conservation measures will be accomplished in the order of "pay-back" periods, with those having the shortest pay-back periods funded first. However, HUD Field Offices should permit IHAs to make adjustments to this funding order because of insufficient funds to accomplish high cost ECMs or a situation in which an ECM with a longer pay-back period can be more efficiently installed in conjunction with other planned modernization. Field Offices may not authorize installation of individual utility meters that measure the energy or fuel used for space heating in dwelling units that need substantial weatherization, when installation of meters would result in economic hardship for tenants. In these cases, the ECMs related to weatherization must be accomplished before the installation of individual utility meters.

(b) For example, by means of an energy audit of an IHA-owned project, an IHA determines the following order of funding for energy conservation measures:

Energy conservation measure	Pay-back (years)
Weatherstrip doors	1.5
Ceiling insulation	4.5
Electric checkmeters	5.2
Clock thermostats	5.7
Storm windows and doors	7.1
Improved boiler controls	10.3
Solar hot water heaters	14.7

(c) The IHA shall accomplish these energy conservation measures in the order listed, to the extent funds are available. If, however, insufficient funds would be available for ceiling insulation but there would be sufficient funds for clock thermostats, installation of the latter could be approved. Also, electric checkmeters can be delayed until after storm windows and doors are installed if the project is designed for electricity to be used for space heating dwellings.

#### § 905.812 Funding.

(a) The cost of accomplishing cost-effective energy conservation measures, including the cost of performing energy audits, shall be funded from operating funds of the IHA to the extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization program, for funding from any available development funds in case of projects still in development or for other available funds that HUD may designate to be used for energy conservation.

(b) If an IHA finances energy conservation measures from sources other than CIAP or operating reserves, such as on the basis of a promise to repay, HUD may agree to provide adjustments in its calculation of the IHA's operating subsidy eligibility under the PFS for the project and utility involved if the financing arrangement is cost-beneficial to HUD. To receive the benefit of this type of adjustment, an IHA's repayments may not exceed the cost of the energy saved as a result of the energy conservation measures during a period not to exceed 12 years. See § 905.730(e) of this chapter.

#### § 905.815 Energy conservation equipment.

In purchasing original or, when needed, replacement equipment, IHAs shall acquire only:

(a) Equipment that meets or exceeds the minimum efficiency requirements established by the U.S. Department of Energy.

(b) Gas cooking ranges that are equipped with electric or mechanical ignition in lieu of standing pilot lights unless a life cycle cost analysis made by the IHA determines that standing pilot lights are more economical over the expected life of the ranges.

(c) Gas furnaces and space heaters that are equipped with automatic electric ignition and automatic flue dampers.

(d) Electric refrigerators, cooking ranges and domestic hot water heaters that are of the highest efficiency offered by a manufacturer for the type and size required, unless a life-cycle cost analysis determines that the less efficient model is more economical over the life of the appliance.

(e) New and replacement space heating thermostats that have been factory set for a maximum temperature of no more than 75 degrees F for elderly dwelling units and 72 degrees F for non-elderly dwelling units.

(f) In case of any conflicts between the requirements of paragraph (a) of this section and those of paragraphs (b) through (e) of this section, IHAs shall follow the requirements of paragraph (a).

#### § 905.820 Energy conservation practices.

In the operation of their facilities, IHAs shall follow operating practices directed to maximum energy conservation. Such practices shall include, but not be limited to, the following:

(a) The temperature of domestic hot water at the taps shall not exceed 120 degrees F.

(b) All standing pilot lights in gas furnaces or space heaters shall be extinguished during the non-heating season.

#### § 905.822 Compliance schedule.

(a) The energy audits required in § 905.805 shall be completed no later than 36 months after June 1990.

(b) For approval of modernization funding after September 30, 1990, an IHA shall have completed an energy audit on the project before submission of the final application for modernization.

(c) All energy conservation measures determined by energy audits to be cost effective shall be accomplished as funds are available.

(d) The requirements for energy conservation equipment specified in § 905.815 shall be effective three months after June 1990.

(e) The requirements for energy conservation practices specified in § 905.820 shall be effective for all projects under IHA management in June 1990.

#### § 905.825 Energy performance contracts.

(a) *Method of procurement.* Energy performance contracting shall be



conducted using one of the following methods of procurement:

(1) Competitive proposals (see § 905.175(d)). In identifying the evaluation factors and their relative importance, as required by § 905.175(d)(1), the solicitation shall state that technical factors are significantly more important than price (of the energy audit); or

(2) If the services are available only from a single source, noncompetitive proposals (see § 905.175(e)(2)).

(b) *HUD review.* Solicitations for energy performance contracts shall be submitted to the HUD Office of Indian Programs for review and approval before issuance. Energy performance contracts shall be submitted to the Office of Indian Programs for review and approval before award.

#### Individual Metering of Utilities

##### § 905.840 Individually metered utilities.

(a) All utility service shall be individually metered to tenants, either through provision of retail service to the tenants by the utility supplier or through the use of checkmeters unless:

(1) Individual metering is impracticable, such as in the case of a central heating system in an apartment building;

(2) Change from a mastermetering system to individual meters would not be financially justified based upon a benefit/cost analysis; or

(3) Checkmetering is not permissible under state or local law, or under the policies of the particular utility supplier or public service commission.

(b) If checkmetering is not permissible, retail service must be considered. Where checkmetering is permissible, the type of individual metering offering the most savings to the IHA shall be selected.

##### § 905.842 Benefit/cost analysis.

(a) A benefit/cost analysis shall be made to determine whether a change from a mastermetering system to individual meters will be cost effective, except as otherwise provided in § 905.846. In making this analysis, the following percentage factors shall be used to estimate utility consumption resulting from changes from a mastermeter system without checkmeters to systems with individual meters.

Utility function	Retail service	Checkmeters
Lighting and refrigeration.....	75	85
Cooking.....	75	85
Domestic hot water.....	75	85

Utility function	Retail service	Checkmeters
Space heating.....	65	75

(b) Proposed installation of checkmeters must be justified on the basis that the cost of debt service (interest and amortization) of the estimated installation costs plus the operating costs of the checkmeters will be more than offset by reduction in future utilities expenditures to the IHA under the mastermeter system. The following steps will normally be performed in making this analysis:

(1) Ascertain current utility costs in terms of consumption by tenants and the applicable rate utilizing monthly billings and data from the utility supplier. The monthly average should be based on data for the preceding 12-month period.

(2) Estimate changes in consumption after installation of checkmeters utilizing the table set forth in paragraph (a) of this section.

(3) Compute utility cost after installation of checkmeters using the applicable rate.

(4) Compute the gross annual savings resulting from use of checkmeters.

(5) Estimate the costs of operation of the checkmeter system, including maintenance, repairs, meter reading, and billing.

(6) Compute the net annual savings.

(7) Compute the present worth of savings for a 20-year period using the current minimum loan interest rate.

(8) Estimate costs of checkmeter purchase and installation, including cost of meters, meter loops, labor, and materials.

(9) Compare paragraphs (b)(7) and (8) of this section. If paragraph (b)(7) of this section is greater than (b)(8) of this section, the conversion is cost effective.

(c) Proposed conversion to retail service must be justified on the basis of net savings to the IHA. This determination involves making a comparison between the reduction in utility expense obtained through eliminating the expense to the IHA for IHA-supplied utilities compared to the resultant allowance for tenant-supplied utilities, based on the cost of utility service to the tenants after conversion. The following steps will normally be performed in making this analysis:

(1) Ascertain current utility costs in terms of consumption by tenants and the applicable rate utilizing monthly billings and data from the utility supplier, based on data for the preceding 12-month period.

(2) Estimate annual cost of maintenance and repair of existing

utility system for the same 12-month period.

(3) Compute total annual expense of utility service (sum of paragraphs (c)(1) and (2) of this section).

(4) Estimate changes in consumption after conversion to retail service, using the table set forth in paragraph (a) of this section.

(5) Compute utility cost after conversion to retail service using the applicable retail service schedule.

(6) Compare paragraphs (c)(3) and (5) of this section. If paragraph (c)(3) is greater, conversion to retail service will be cost effective.

##### § 905.844 Funding.

The cost to change mastermeter systems to individual metering of tenant consumption, including the costs of benefit/cost analysis and complete installation of checkmeters, shall be funded from operating funds of the IHA to the extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization project or for funding from any available development funds.

##### § 905.845 Order of conversion.

Conversions to individually metered utility service shall be accomplished in the following order where an IHA has projects of two or more of the designated categories, unless otherwise approved by the HUD Field Office:

(a) In projects where retail service is provided by the utility supplier and the IHA is paying all the individual utility bills, no benefit/cost analysis is necessary and tenants shall be billed directly after the IHA adopts revised payment schedules providing appropriate allowances for tenant-supplied utilities.

(b) In projects where checkmeters have been installed but are not being utilized as the basis for determining utility charges to the tenants, no benefit/cost analysis is necessary and the checkmeters shall be used as the basis for utility charges, and tenants shall be surcharged for excess utility use.

(c) Projects where meter loops have been installed for utilization of checkmeters, shall be analyzed both for the installation of checkmeters and for conversion to retail service.

(d) Low or medium rise family units with a mastermeter system should be analyzed for both checkmetering and conversion to retail service, because of their large potential for energy savings.

(e) Low or medium rise housing for elderly should next be analyzed for both checkmetering and conversion to retail



service, since the potential for energy saving is less than for family units.

(f) Electric service under mastermeters for high rise buildings, including projects for the elderly, should be analyzed for both use of retail service and of checkmeters.

#### § 905.846 Actions affecting residents.

(a) Before making any conversion to retail service, the IHA shall adopt revised payment schedules, providing appropriate allowances for the tenant-supplied utilities resulting from the conversion.

(b) Before implementing any modifications to utility services arrangements with the tenants or charges with respect thereto, the requisite changes shall be made in tenant dwelling leases in accordance with subpart D.

(c) To the extent practicable, IHAs should work closely with tenant organizations in making plans for conversion of utility service to individual metering, explaining the national policy objectives of energy conservation, the changes in charges and rent structure that will result, and the goals of achieving an equitable structure that will be advantageous to tenants who conserve energy.

(d) A transition period of at least six months shall be provided in the case of initiation of checkmeters during which tenants will be advised of the charges but during which no surcharge will be made, based on the readings. This trial period will afford tenants ample notice of the effects the checkmetering system will have on their individual utility charges and also afford a test period for the adequacy of the utility allowances established.

(e) During and after the transition period, IHAs shall advise and assist tenants with high utility consumption on methods for reducing their usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances, and corrective maintenance.

#### § 905.848 Compliance schedule.

(a) IHAs shall complete benefit/cost analyses for all mastermetered projects within eighteen months after June 1990.

(b) Mastermetered projects determined to be cost effective for conversion to retail service or checkmetering shall be so converted according to their order of priority as specified in § 905.812, as funds become available.

#### § 905.849 Waivers for similar projects.

IHAs with more than one project of similar design and utilities service may

prepare a benefit/cost analysis for a representative project. A finding that a change in metering is not cost effective for the representative project is sufficient reason for the HUD field office to waive the requirements of this subpart for benefit/cost analysis on the remaining similar projects.

#### § 905.850 Reevaluations of mastermeter systems.

Because of changes in the cost of utility services and the periodic changes in utility regulations, IHAs with mastermeter systems are required to reevaluate mastermeter systems without checkmeters by making benefit/cost analyses at least every 36 months. HUD field offices may grant waivers of this requirement upon making a finding as provided in § 905.849.

#### Resident Utility Allowances

##### § 905.860 Applicability.

(a) Sections 905.860 through 905.876 apply to all Indian housing dwelling units, including those operated under the Mutual Help Homeownership Program.

(b) In rental units where utilities are furnished by the IHA but there are no checkmeters to measure the actual utilities consumption of the individual units, tenants shall be subject to charges for consumption of tenant-owned major appliances, or for optional functions of IHA-furnished equipment, in accordance with paragraph (e) of this section, but no utility allowance will be established.

##### § 905.865 Establishment of utility allowances by IHAs.

(a) IHAs shall establish allowances for IHA-furnished utilities for all checkmetered utilities and allowances for tenant-purchased utilities for all utilities purchased directly by tenants from the utilities suppliers.

(b) The IHA shall maintain a record that documents the basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised. Such record shall be available for inspection by tenants.

(c) The IHA shall give notice to all tenants of proposed allowances and scheduled surcharges and revisions thereof. Such notice shall be given, in the manner provided in the lease or homebuyer agreement, not less than 60 days before the proposed effective date of the allowances or scheduled surcharges or revisions; shall describe with reasonable particularity the basis for determination of the allowances, scheduled surcharges or revisions, including a statement of the specific items of equipment and function whose utility consumption requirements were included in determining the amounts of

the allowances or scheduled surcharges; shall notify tenants of the place where the IHA's record maintained in accordance with paragraph (b) above is available for inspection; and shall provide all tenants an opportunity to submit written comments during a period expiring not less than 30 days before the proposed effective date of the allowances or scheduled surcharges or revisions. Such written comments shall be retained by the IHA and shall be available for inspection by tenants and, upon request, by HUD.

(d) The IHA shall furnish to HUD, as instructed, a copy of its schedule of allowances and scheduled surcharges, and each revision thereof, promptly upon such schedule becoming effective. Schedules of allowances and scheduled surcharges shall not ordinarily be subject to approval by HUD before becoming effective but will be reviewed in the course of audits or reviews of IHA operations. Following such audits or reviews, HUD may require additional data concerning the IHA's basis for determination of allowances or scheduled surcharges, may require additional or different relevant data to be considered by the IHA in its next annual review on an exception basis, may require that an IHA submit its proposed revision of allowances or scheduled surcharges to HUD for review and approval before the revision is adopted.

(e) Except where a different standard of review is applicable in review procedures governed by applicable State law, the IHA's determinations of allowances, scheduled surcharges and revisions thereof shall be final and valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(Information collection requirements were approved by the Office of Management and Budget under control number 2577-0062)

##### § 905.867 Categories for establishment of allowances.

Separate allowances shall be established for each utility and for each category of dwelling units determined by the IHA to be reasonably comparable as to factors affecting utility usage. The IHA will establish allowances for different size units, in terms of numbers of bedrooms. Other categories may be established at the discretion of the IHA.

##### § 905.869 Period for which allowances are established.

(a) IHA-furnished utilities. Allowances will normally be established on a quarterly basis; however, tenants may be surcharged on



a monthly basis. The allowances established may provide for seasonal variations.

(b) *Tenant-purchased utilities.* Monthly allowances shall be established at a uniform monthly amount based on an average monthly utility requirement for a year; however, if the utility supplier does not offer tenants a uniform payment plan, the allowances established may provide for seasonal variations.

**§ 905.870 Standards for allowances for utilities.**

(a) The objective of an IHA in designing methods of establishing utility allowances for each dwelling unit category and unit size shall be to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment. Stated another way, it should be an objective of the allowance that excess consumption which may result in a surcharge (or absorption of utility cost in excess of the allowance) should be an amount of consumption that is reasonably within the control of a tenant household to avoid.

(b) Allowances for both IHA-furnished and tenant-purchased utilities shall be designed to include such reasonable consumption for major equipment or for utility functions furnished by the IHA for all tenants (e.g., heating furnace, hot water heater), for essential equipment whether or not furnished by the IHA (e.g., range and refrigerator), and for minor items of equipment (such as toasters and radios) furnished by tenants.

(c) The complexity and elaborateness of the methods chosen by the IHA, in its discretion, to achieve the foregoing objective will be dependent upon the data available to the IHA and the extent of the administrative resources reasonably available to the IHA to be devoted to the collection of such data, the formulation of methods of calculation, and actual calculation and monitoring of the allowances. Recommended sources of data for determining reasonable consumption levels include:

- (1) Consumption information from the IHA's records or obtained through current reading of checkmeters.
- (2) Consumption data on residential use of utilities obtained from utility suppliers or other sources.
- (3) Engineering calculations based on technical data concerning energy requirements of appliances and equipment and of projects and units having particular characteristics.

(4) Data concerning energy requirements available from governmental and other sources.

(5) Data obtained from energy audits.

(d) In establishing allowances, the IHA shall take into account relevant factors affecting consumption requirements, including:

(1) The equipment and functions intended to be covered by the allowance for which the utility will be used. For instance, natural gas may be used for cooking or heating domestic water or space heating or any combination of the three.

(2) The climatic location of the housing projects.

(3) The size of the dwelling units and the number of occupants per dwelling unit.

(4) Type of construction and design of the housing project.

(5) The energy efficiency of IHA-supplied appliances and equipment.

(6) The utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by the total tenant payment.

(7) The physical condition, including insulation and weatherization, of the housing project.

(8) Temperature levels intended to be maintained in the unit during the day and at night, and in cold and warm weather.

(9) Temperature of domestic hot water.

**§ 905.872 Surcharges for excess consumption of IHA-furnished utilities.**

(a) For dwelling units subject to allowances for IHA-furnished utilities where checkmeters have been installed, the IHA shall establish surcharges for utility consumption in excess of the allowances. Surcharges may be computed on a straight per unit of purchase basis (e.g., cents per kilowatt hour of electricity) or for stated blocks of excess consumption, and shall be based on the IHA's average utility rate. The basis for calculating such surcharges shall be described in the IHA's schedule of allowances. Changes in the dollar amounts of surcharges based directly on changes in the IHA's average utility rate shall not be subject to the advance notice requirements of this section.

(b) For dwelling units served by IHA-furnished utilities where checkmeters have not been installed, the IHA shall establish schedules of surcharges indicating additional dollar amounts tenants will be required to pay by reason of estimated utility consumption attributable to tenant-owned major appliances or to optional functions, such

as air conditioning, of IHA-furnished equipment. Such surcharge schedules shall state the tenant-owned equipment (or functions of IHA-furnished equipment) for which surcharges shall be made and the amounts of such charges, which shall be based on the cost to the IHA of the utility consumption estimated to be attributable to reasonable usage of such equipment.

**§ 905.874 Review and revision of allowances.**

(a) *Annual review.* The IHA shall review at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the standards stated in § 905.870, shall establish revised allowances. The review shall include all changes in circumstances (including completion of comprehensive or special purpose modernization under the Comprehensive Improvement Assistance Program and/or other energy conservation measures implemented by the IHA) indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.

(b) *Revision as a result of rate changes.* The IHA may revise its allowances for tenant-purchased utilities between annual reviews if there is a rate change (including fuel adjustments) and shall be required to do so if such change, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which such allowances were based. Adjustments to tenant payments as a result of such changes shall be retroactive to the first day of the month following the month in which the last rate change taken into account in such revision became effective.

(Information collection requirements were approved by the Office of Management and Budget under control number 2577-0062)

**§ 905.876 Individual relief.**

Requests for relief from surcharges for excess consumption of IHA-purchased utilities, or from payment of utility supplier billings in excess of the allowances for tenant-purchased utilities, may be granted by the IHA on reasonable grounds, such as special needs of elderly, ill or handicapped tenants, or special factors affecting utility usage not within the control of the tenant, as the IHA shall deem appropriate. The IHA's criteria for granting such relief, and procedures for requesting such relief, shall be adopted at the time the IHA adopts the methods



and procedures for determining utility allowances. Notice of the availability of such procedures (including identification of the IHA representative with whom initial contact may be made by tenants), and the IHA's criteria for granting such relief, shall be included in each notice to tenants given in accordance with § 905.865(c) and in the information given to new tenants upon admission.

#### Subpart L—Operation of Projects After Expiration of Initial ACC Term

##### § 905.901 Purpose and applicability.

(a) *Purpose.* This subpart specifies methods for extending the effective period of provisions of the ACC relating to project operation beyond the original ACC term. Such an extension provides a contractual basis for continued eligibility for operating subsidy.

(b) *Applicability.* This subpart applies to any Indian housing project which is owned by an IHA and is subject to an ACC under section 5 of the United States Housing Act of 1937, including rental, Turnkey III, or Mutual Help housing. However, it does not apply to the Section 8 and Section 23 Housing Assistance Payments Programs and the Section 10(c) and Section 23 Leased Housing Programs.

##### § 905.903 Continuing eligibility for operating subsidy; ACC extension.

(a) *Operating subsidy.* After the initial term of the ACC, HUD will pay operating subsidy with respect to a project only in accordance with an ACC amendment providing for extension of the term of the ACC provisions related to project operation for at least ten years after the last payment of HUD assistance. The ACC amendment shall be in the form prescribed by HUD, and shall specify the particular provisions of the ACC that relate to continued project operation and, therefore, remain in effect for the extended ACC term. These provisions shall include a requirement that the IHA execute and file, for public record, an appropriate document evidencing the IHA's covenant not to convey, encumber or make any other disposition of the project without HUD approval for a period of ten years after the receipt of the last payment of HUD assistance.

(b) *Consolidated ACC.* Where a single ACC covers more than one project (consolidated ACC), each annual operating subsidy payable under that ACC is a lump-sum amount which is not divided into discrete amounts for the individual projects subject to the consolidated ACC (see subpart J of this chapter). Accordingly, if an IHA, before submitting a request for operating

subsidy, determines that any project(s) under the consolidated ACC will not require operating subsidy and should not be subject to the provisions of paragraph (a) of this section, the IHA shall accompany its request with a resolution adopted by the Board of Commissioners certifying that no operating subsidy shall be used with respect to such project(s) thereafter and that all financial records and accounts shall be kept separately for such project(s). In such cases, the removal of the project(s) from the request for operating subsidy shall be reflected by the inclusion of that number of unit months available for the project(s) when making the calculations, under subpart J of this chapter, for determination of total amount of operating subsidy payable under the consolidated ACC. In any event no operating subsidy payable under a consolidated ACC or otherwise shall be used to pay, directly or indirectly, any costs attributable to a project which is ineligible or otherwise excluded from operating subsidy under paragraph (a). Even if no operating subsidy is received with respect to a project, the IHA remains obligated to maintain and operate the project in accordance with the provisions of the ACC related to project operation so long as those ACC provisions remain in effect.

##### § 905.905 ACC extension in absence of current operating subsidy.

Where no operating subsidy is being paid under an ACC, the IHA shall, at least one year before the anticipated ACC expiration date for the project, notify HUD as to whether or not the IHA desires to maintain a basis for receiving operating subsidy with respect to the project after the anticipated ACC expiration date. This notification shall be submitted to the appropriate HUD Field Office in the form of a resolution by the IHA's Board of Commissioners. If the IHA does not desire to maintain a basis for operating subsidy payments with respect to the project after the anticipated ACC expiration date, the resolution shall certify that no operating subsidy shall be utilized with respect to the project after the effective date of this rule and that all financial records and accounts for such a project shall be kept separately. If the IHA does desire to maintain a basis for such operating subsidy payments, the resolution shall include the IHA's request for extension of the term of the ACC provisions related to project operation, for a period of not less than one nor more than 10 years. Upon HUD's receipt of the request, HUD and the IHA shall enter into an ACC amendment effecting the

extension for the period requested by the IHA, unless HUD finds that continued operation of the project cannot be justified under the standards set forth in subpart M.

##### § 905.907 HUD approval of disposition or demolition.

During the post-assistance service period of continued operation as low-income housing, HUD may authorize an IHA to dispose of or demolish housing units at any time, in accordance with subpart M.

#### Subpart M—Disposition or Demolition of Projects

##### § 905.921 Purpose and applicability.

(a) *Purpose.* This subpart sets forth requirements for HUD approval of an IHA's application to dispose of or demolish (in whole or in part) IHA-owned projects assisted under the Act. The rules and procedures contained in 24 CFR Part 85 are inapplicable.

(b) *Applicability.*—(1) *Type of projects.* This subpart applies to any Indian housing project which is owned by an IHA and is subject to an ACC under section 5 of the United States Housing Act of 1937, including rental, Turnkey III, or Mutual Help housing. However it does not apply to:

(i) IHA-owned Section 8 housing or housing leased under section 10(c) or section 23 of the Act;

(ii) Demolition or disposition before the end of the initial operating period (EIO), as determined under the ACC, of property acquired incident to the development of an Indian housing project (however, this exception does not apply to units occupied or available for occupancy by Indian housing tenants before EIO);

(iii) Conveyance of Indian housing for the purpose of providing homeownership opportunities for low-income families under section 21 of the Act, the Turnkey III or Mutual Help Homeownership Opportunity programs, or any other homeownership programs established under section 5(h), 6(c) (4)(D), or Title II of the Act.

(iv) Leasing of dwelling or nondwelling space incident to the normal operation of the project for Indian housing purposes, as permitted by the ACC;

(v) Reconfiguration of the interior space of buildings (e.g., moving or removing interior walls to change the design, sizes or number of units) without demolition;

(vi) A whole or partial taking by a public or quasi-public entity through the



exercise of its power of eminent domain; and

(vii) Units approved for deprogramming before February 5, 1988.

(b) *Type of actions.* Any action by an IHA to dispose of or demolish an Indian housing project or a portion of an Indian housing project is subject to the requirements of this subpart. Until such time as HUD approval may be obtained, the IHA may not take any action to dispose of or demolish an Indian housing project or a portion of an Indian housing project, and the IHA shall continue to meet its ACC obligations to maintain and operate the property as housing for low-income families. This does not, however, mean that HUD approval under this subpart is required for planning activities, analysis, or consultations, such as project viability studies, comprehensive modernization planning, or comprehensive occupancy planning.

**§ 905.923 General Requirements for HUD Approval of Disposition or Demolition.**

(a) For purposes of this subpart, the term *tenant* will also include "homebuyer" where the development involved is a homeownership project, and the term "unit of general government" will include the tribal government, where applicable.

(b) HUD will not approve an application for disposition or demolition unless:

(1) The application has been developed in consultation with tenants of the project involved, any tenant organizations for the project, and any IHA-wide tenant organizations that will be affected by the disposition or demolition;

(2) Except where no dwelling units are involved, the application contains a certification by the chief executive officer, or designee, of the unit of general government that the proposed activity is consistent with any applicable comprehensive housing affordability strategy;

(3) If any displacement of tenants is involved, the relocation requirements of § 905.925 are satisfied;

(4) Demolition or disposition (including any related replacement housing plan) will meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321), the National Historic Preservation Act of 1966 (16 U.S.C. 469), and related laws, as stated in the Department's regulations at 24 CFR Part 50; and

(5) The IHA has developed a replacement housing plan, in accordance with § 905.935, and has obtained a commitment for the funds necessary to carry out the plan over the

approved schedule of the plan. To the extent such funding is not provided from other sources (e.g., State or local programs or proceeds of disposition), HUD approval of the application for demolition or disposition is conditioned on HUD's agreement to commit the necessary funds (subject to availability of future appropriations).

**§ 905.925 Relocation of Displaced Tenants.**

(a)(1) Tenants who are to be displaced as a result of disposition or demolition must be relocated to other decent, safe, sanitary, and affordable housing (at rents no higher than permitted under the Act), which is, to the maximum extent practicable, housing of their choice, on a nondiscriminatory basis, without regard to race, color, religion (creed), national origin, handicap, age, or sex, in compliance with applicable Federal and State laws.

(2) Relocation may be to other publicly assisted housing, including housing assisted under Section 8 of the Act and housing available as a result of the Section 8 Rental Voucher Program, provided that the IHA ensures that the rent initially paid by the displaced tenant following relocation will not exceed the amount permitted under section 3(a) of the Act. The IHA shall be responsible for providing assistance to the displaced tenant in this regard and may use vouchers or certificates to ensure that the rent paid by the tenant does not exceed the amount permitted under section 3(a) of the Act. Nothing in this paragraph shall prohibit a displaced tenant from requesting a voucher under the Section 8 Rental Voucher Program for use in a housing unit with rent that exceeds the amount permitted under section 3(a) of the Act, if such a unit is chosen by a displaced tenant who has been provided an opportunity to use housing voucher assistance in accordance with this paragraph.

(b) In addition to provision of relocation housing, assistance to all displaced tenants shall include assistance in finding other suitable housing (preferably on the reservation or within the jurisdiction of the IHA), including payment of actual, reasonable moving costs, and counseling and advisory services to assure that full choices and real opportunities exist for tenants displaced from Indian housing scheduled for disposition or demolition to select relocation housing in a full range of neighborhoods in which suitable relocation housing may be found. Tenants to be displaced become eligible for assistance as of the date of receipt of an official notice to move. The Uniform Relocation Assistance and Real

Property Acquisition Policies Act of 1970 and the government-wide regulations implementing that Act, 49 CFR part 40, apply to displacement as a result of the activities covered by this subpart.

**§ 905.927 Specific Criteria for HUD Approval of Disposition Requests.**

In addition to other applicable requirements of this subpart, HUD will not approve a request for disposition unless HUD determines that retention is not in the best interests of the tenants and the IHA, because at least one of the following criteria is met:

(a) Developmental changes in the area surrounding the project (e.g., density, or industrial or commercial development) adversely affect the health or safety of the tenants or the feasible operation of the project by the IHA.

(b) Disposition will allow the acquisition, development, or rehabilitation of other properties that will be more efficiently or effectively operated as low-income housing projects, and that will preserve the total amount of low-income housing stock available to the community. An IHA must be able to demonstrate to the satisfaction of HUD that the additional units are being provided in connection with the disposition of the property.

(c) There are other factors justifying disposition that HUD determines are consistent with the best interests of the tenants and the IHA that are not inconsistent with other provisions of the Act. As an example, if the property meets any of the criteria for demolition under § 905.928, it may be disposed of under this criterion (§ 905.927(a)(3)) subject to conditions that HUD may impose (e.g., demolition to follow disposition in order to assure abatement of a threat to safety or health).

(d) In the case of disposition of property other than dwelling units:

(1) The property is determined by HUD to be excess to the needs of the project (after the end of the initial operating period), or

(2) The disposition of the property is incidental to, or does not interfere with, continued operation of the remaining portion of the project.

**§ 905.928 Specific Criteria for HUD Approval of Demolition Requests.**

In addition to other applicable requirements of this subpart, HUD will not approve an application for demolition unless HUD determines that at least one of the following criteria is met:

(a) In the case of demolition of all or a portion of a project, the project, or a portion of the project, is obsolete as to



physical condition, location, or other factors, making it unusable for housing purposes; and no reasonable program of modifications, in keeping with the provisions of subpart I, is feasible to return the project or portion of the project to useful life. Major problems indicative of obsolescence are—

(1) As to physical condition: structural deficiencies, substantial deterioration, or other design or site problems (e.g., severe erosion or flooding);

(2) As to location: physical deterioration of the neighborhood; change from residential to industrial or commercial development; or environmental conditions as determined by HUD environmental review in accord with 24 CFR part 50, which jeopardize the suitability of the site or a portion of the site and its housing structures for residential use; and

(3) Other factors which have seriously affected the marketability, usefulness, or management of the property.

(b) In the case of demolition of only a portion of a project, the demolition will help to assure the useful life of the remaining portion of the project (e.g., to reduce project density).

#### § 905.931 IHA Application for HUD Approval.

Written approval by HUD shall be required before the IHA may undertake any transaction involving demolition or disposition. To request approval, the IHA shall submit an application to the appropriate HUD office that includes the following:

(a) A description of the property involved;

(b) A description of, as well as a timetable for, the specific action proposed (including, in the case of disposition, the specific method proposed);

(c) A statement justifying the proposed disposition or demolition under one or more of the applicable criteria of § 905.927 or § 905.928.

(d) If applicable, a plan for the relocation of tenants who would be displaced by the proposed demolition or disposition (see § 905.925). The relocation plan must at least indicate:

(1) The number of tenants to be displaced;

(2) What counseling and advisory services the IHA plans to provide;

(3) What housing resources are expected to be available to provide housing for displaced tenants;

(4) An estimate of the costs for counseling and advisory services and tenant moving expenses, and the expected source for payment of these costs (see § 905.935); and

(5) The minimum official notice that the IHA will give tenants before they are required to move;

(e) A description of the IHA's consultations with tenants and any tenant organizations (as required under § 905.923(b)(1)), with copies of any written comments which may have been submitted to the IHA and the IHA's evaluation of the comments;

(f) A replacement housing plan, as required under § 905.935, and a statement by the chief executive officer, or designee, of the government with which the IHA has a cooperation agreement covering that project, indicating approval of the replacement plan;

(g) If required under § 905.923(b)(2), a certification by the chief executive officer, or designee, of the government that the proposed demolition or disposition is consistent with any applicable comprehensive housing affordability strategy;

(h) The estimated balance of project debt, under the ACC, for development and modernization;

(i) In the case of disposition, an estimate of the fair market value of the property, established on the basis of one independent appraisal unless, as determined by HUD:

(1) More than one appraisal is warranted, or

(2) Another method of valuation is clearly sufficient and the expense of an independent appraisal is unjustified because of the limited nature of the property interest involved or other available data;

(j) In the case of disposition, estimates of the gross and net proceeds to be realized, with an itemization of estimated costs to be paid out of gross proceeds and the proposed use of any net proceeds in accordance with § 905.933;

(k) A copy of a resolution by the IHA's Board of Commissioners approving the application;

(l) If determined to be necessary by HUD, an opinion by the IHA's legal counsel that the proposed action is consistent with applicable requirements of Federal, State, Tribal and local laws; and

(m) Any additional information necessary to support the application and assist HUD in making determinations under this subpart.

#### § 905.933 Use of Proceeds.

(a) *Disposition.* (1) Where HUD approves the disposition of real property of a project, in whole or in part, the IHA shall dispose of it promptly by public solicitation of bids for not less than fair market value, unless HUD authorizes

negotiated sale for reasons found to be in the best interests of the IHA or the Federal government, or for sale for less than fair market value (where permitted by State, Tribal or local law), based on commensurate public benefits to the community, the IHA or the Federal government justifying such an exception. Reasonable costs of disposition, and of relocation of displaced tenants allowable under § 905.925, may be paid by the IHA out of the gross proceeds, as approved by HUD.

(2) Net proceeds (after payment of HUD-approved costs of disposition and relocation under paragraph (a) of this section) shall be used, subject to HUD approval, as follows: First for the retirement of outstanding obligations, if any, issued to finance development or modernization of the project, and thereafter for the provision of housing assistance for low-income families, through such measures as modernization of low-income housing or the acquisition, development or rehabilitation of other properties to operate as low-income housing.

(b) *Demolition.* Where HUD has approved demolition of a project, or a portion of a project, and the proposed action is part of a modernization program under subpart I of this part, the costs of demolition and of relocation of displaced tenants may be included in the modernization budget.

#### § 905.935 Replacement housing plan.

(a) HUD may not approve an application or furnish assistance under this subpart unless the IHA submitting the application for disposition or demolition also submits a plan for the provision of an additional decent, safe, sanitary, and affordable dwelling unit (at rents no higher than permitted under the Act) for each dwelling unit to be disposed of or demolished under the application. The plan must include any one or a combination of the following:

(1) The acquisition or development of additional low-income housing dwelling units;

(2) The use of 15-year project-based assistance under section 8 (as provided for in 24 CFR part 882, subpart G);

(3) The use of not less than 15-year project-based assistance under other Federal programs;

(4) The acquisition or development of dwelling units assisted under a State or local Tribal government program that provides for project-based assistance comparable in terms of eligibility, contribution to rent, and length of assistance contract (not less than 15



years) to assistance under section 8(b)(1) of the Act; or

(5) The use of 15-year tenant-based assistance under section 8 of the Act (excluding vouchers under section 8(o)), under the conditions described in paragraph (b) of this section.

(b) Fifteen-year tenant-based assistance under section 8 may be approved under the replacement plan only if:

(1) There is a finding by HUD that replacement with project-based assistance is not feasible; that the supply of private rental housing actually available to those who would receive project-based assistance under the plan is sufficient for the total number of certificates and vouchers available in the community after implementation of the plan; and that this available housing supply is likely to remain available for the full 15-year term of the assistance; and

(2) HUD's findings under paragraph (b)(1) of this section are based on objective information, which must include rates of participation by landlords in the section 8 program; size, condition, and rent levels of available rental housing as compared to section 8 standards; the supply of vacant existing housing meeting the section 8 housing quality standards with rents at or below the fair market rent or the likelihood of adjusting the fair market rent; the number of eligible families waiting for housing assistance under the Act; the extent of discrimination practiced against the types of individuals or families to be served by the assistance; and such additional data as HUD may determine to be relevant in particular circumstances.

(3) To justify a finding under paragraph (b)(1) of this section, the IHA must provide sufficient information to support both parts of the finding—why project-based assistance is infeasible and how the conditions for tenant-based assistance will be met, based on the pertinent data from the local housing market, as prescribed in paragraph (b)(2) of this section. The determination as to infeasibility of project-based assistance must be based on the standards for feasibility, if any, stated in the respective regulations that govern each type of eligible project-based program identified in paragraph (a) of this section. A finding of infeasibility may thus be made only if the applicable feasibility standards cannot be met under any of those project-based programs, or any combination of them.

(c) The plan must be approved by the unit of general local government (including tribal government) in which the project is located.

(d) The plan must include a schedule for carrying out all its terms within a period consistent with the size of the proposed disposition or demolition, except that the schedule for completing the plan shall in no event exceed 6 years from the date specified to begin plan implementation.

(e) The plan must include a method that ensures that at least the same total number of individuals and families will be provided housing, allowing for replacement with units of different sizes to accommodate changes in local priority needs.

(f) The plan must prevent the taking of any action to dispose of or demolish any unit until the tenant of the unit is relocated in accordance with § 905.925. This does not preclude actions permitted under § 905.921(b), actions required under this subpart for development and submission of the IHA's application for HUD approval of disposition or demolition, or actions required to carry out a relocation plan that has been approved by HUD in accordance with §§ 905.925 and 905.931(d).

(g) The plan must include an assessment of the suitability of the location of proposed replacement housing based upon application of the site selection criteria established in § 905.230.

(h) The plan must contain assurances that any replacement units acquired, newly constructed or rehabilitated will meet the applicable accessibility requirements set forth in 24 CFR 8.25.

#### § 905.937 Reports and records.

(a) After HUD approval of disposition or demolition of all or part of a project, the IHA shall keep the appropriate HUD office informed of significant actions in carrying out the disposition or demolition, including any significant delays or other problems. When disposition or demolition is completed, the IHA shall submit to the HUD office a report confirming the action, certifying compliance with all applicable requirements of Federal law and regulations and, in the case of disposition, accounting for the proceeds and costs of disposition.

(b) The IHA shall be responsible for keeping records of its HUD-approved disposition or demolition sufficient for audit by HUD to determine the IHA's compliance with applicable requirements of Federal law and this subpart.

#### Subpart N—Miscellaneous

##### § 905.950 Operating subsidy eligibility for projects owned by IHA's in Alaska.

(a) The provisions of this subpart N are applicable to the development, modernization, and operation of the Turnkey III Homeownership Opportunity Program and the rental housing owned by the IHAs in the State of Alaska.

(b) The financial management systems, reporting and monitoring on program performance and financial reporting will be in compliance with the requirements of 24 CFR 85.20, 85.40, and 85.41, except to the extent that HUD requirements provide for additional specialized procedures necessary to permit the Secretary to make the determinations regarding the payment of operating subsidy specified in section 9(a) of the United States Housing Act of 1937.

#### Subpart O—Resident Management and Participation

##### § 905.960 Purpose.

The purpose of this subpart is to recognize the importance of involving residents in creating a positive living environment and in contributing to the successful operation of Indian housing. Accordingly, this subpart sets out HUD policies, guidelines, and requirements for resident participation in the management of Indian housing, including resident management of Indian housing.

##### § 905.961 Applicability and scope.

(a) This subpart applies to any Indian housing authority (IHA) that has an Annual Contributions Contract (ACC) with the Department. This subpart does not apply to housing assistance payments under section 8 of the U.S. Housing Act of 1937.

(b) This subpart contains HUD's policies, procedures, and requirements for the participation of Indian housing residents in Indian housing management. These policies, procedures, and requirements apply to all resident participation under this part.

(c) This subpart is designed to encourage increased resident management of Indian housing, as a means of improving existing living conditions in Indian housing. It provides increased flexibility for Indian housing resident management by permitting the retention and use for certain purposes, of any income generated by a resident management corporation in excess of estimated project income; and by providing funding for technical assistance to promote the formation and



development of resident management entities.

**§ 905.962 Definitions.**

**Management.** All activities for which the IHA is responsible to HUD under the ACC, within the definition of "operation" under the Act and the ACC, including the development of resident programs and services.

**Management contract.** A written agreement between a resident management corporation and an IHA, as provided by § 905.967.

**Project.** For purposes of this subpart, it includes any of the following:

- (1) One or more contiguous buildings.
- (2) An area of contiguous row houses.
- (3) Scattered site buildings.
- (4) Scattered site single-family units.

**Resident management.** The performance of one or more management activities for one or more projects by a resident management corporation under a management contract with the IHA.

**Resident Management Corporation (RMC).** A Resident Management Corporation is an entity that proposes to enter into, or enters into, a management contract with an IHA under this part. The corporation must have each of the following characteristics:

(1) It is a nonprofit organization that is incorporated under the laws of the State or Indian tribe within which it is located.

(2) If it is established by more than one resident organization, each such organization both approves the establishment of the corporation and has representation on the Board of Directors of the corporation.

(3) It has an elected Board of Directors.

(4) Its by-laws require the Board of Directors to include representatives of each resident organization involved in establishing the corporation. (It may serve as both the resident management corporation and the resident organization, so long as the corporation meets the requirements of this section for a resident organization.)

(5) Its voting members are required to be residents of the project or projects it manages.

(6) Its establishment is approved by the resident organization, or, if there is no organization, creation of an organization is approved by a majority of the households of the project for the purpose of determining the feasibility of establishing a RMC to manage the project.

**Resident Organization (RO).** A Resident Organization (or "Resident Council" as defined in section 20 of the Act) is an incorporated or

unincorporated nonprofit organization or association that meets each of the following criteria:

(1) It is representative of the residents it purports to represent.

(2) If it represents residents in more than one project or in all of the projects of an IHA, it fairly represents residents from each project that it represents.

(3) It has adopted written procedures providing for the election of specific officers on a regular basis (but at least once every three years).

(4) It has a democratically elected governing board. The voting membership of the board shall consist of the residents of the project or projects that the resident organization represents.

**Resident participation.** A process of consultation between residents and the IHA concerning matters affecting the management of Indian housing, as a means of providing residents with information about IHA plans and decisions and affording them opportunities to make comments and recommendations, on an advisory basis, about those plans and decisions.

**§ 905.963 HUD's rule in activities under this subpart.**

(a) **General.** Subject to the requirements of this part and other requirements imposed on IHAs by statute or regulation, the form and extent of resident participation or resident management are local decisions to be made jointly by resident organizations and the IHAs. HUD will promote resident participation and resident management and will provide additional guidance, as necessary and appropriate. In addition, HUD will endeavor to provide technical assistance in connection with resident management, as described in § 905.965.

(b) **Duty to bargain in good faith.** If an IHA refuses to negotiate with a resident management corporation in good faith or, after negotiations, refuses to enter into a contract, the corporation may file an informal appeal with HUD, setting out the circumstances and providing copies of relevant materials evidencing the corporation's efforts to negotiate a contract. HUD shall require the IHA to respond with a report stating the IHA's reasons for rejecting the corporation's contract offer or for refusing to negotiate. Thereafter, HUD shall require the parties (with or without direct HUD participation) to undertake or to resume negotiations on a contract providing for resident management, and shall take such other actions as are necessary to resolve the conflicts between the parties. If no resolution is achieved within 90 days from the date HUD

required the parties to undertake or resume such negotiations, HUD shall serve notice on both parties that administrative remedies have been exhausted (except that, pursuant to mutual agreement of the parties, the time for negotiations may be extended by no more than an additional 30 days).

**§ 905.964 Resident participation requirements.**

(a) **IHA responsibilities.** (1) An IHA must provide the residents or any resident organization with current information concerning the IHA's policies on resident participation in management, including guidance on information and recognition of a resident organization, and, where appropriate, a resident management corporation.

(2) An IHA must consult with residents or resident organizations (if they exist), to determine the extent to which residents desire to participate in the management of their housing and the specific methods that may be mutually agreeable to the IHA and the residents. An IHA should be willing to consider any reasonable request by residents or resident organizations to participate in management.

(3) When requested by residents, an IHA must provide appropriate guidance to residents to assist them in establishing and maintaining a resident organization, and, where appropriate, a resident management corporation. An IHA should grant formal recognition of the resident organization if it meets the requirements for such an organization, as specified in § 905.962.

(b) **Resident responsibilities.** Residents should have the primary responsibility for determining their goals, organizational structure, and method of operating. A resident organization may request that it be recognized as the official organization representing the residents in meetings with the IHA or with other entities.

(c) **Written understanding.** At a minimum, the IHA and the resident organization should put in writing their understanding concerning the elements of their relationship. If the agreement includes contracting for the resident organization to perform any of the functions for which the IHA is responsible to HUD under the ACC, the provisions of § 905.966 apply.

(d) **Funding.** (1) An IHA, at its discretion and subject to the availability of funds, may provide reasonable in-kind and cash assistance for resident participation and resident management activities. This assistance will be considered an eligible operating expense



of an IHA, subject to HUD approval of the IHA's operating budget. Eligible resident participation costs may include funding for the administrative costs and activities of the resident organization, in addition to noncash contributions such as technical assistance, space office furniture and duplicating services.

(2) Cash contributions to a resident organization may be made only under a written agreement between the IHA and resident organization, which includes a resident organization budget acceptable to the IHA. The agreement must require the resident organization to account to the IHA for use of the funds and permit the IHA to inspect and audit the resident organization's financial records related to the agreement.

(3) IHAs are encouraged to coordinate their contributions with available assistance from other private and public agencies.

#### **§ 905.965 Resident management requirements.**

The following requirements apply when an IRA and its tenants are interested in providing for resident performance of management functions in one or more projects under this subpart.

(a) *Resident management corporation.* Residents interested in contracting with an IHA must establish a resident management corporation that meets the requirements for such a corporation, as specified in this subpart.

(b) *IHA responsibilities.* IHAs shall be supportive of resident interest in forming a resident management corporation, and shall work with residents to determine the feasibility of resident management. IHAs shall give full and serious consideration to resident management corporations seeking to enter into a management contract with the IHA. An IHA shall enter into good-faith negotiations with a resident management corporation seeking to contract to provide management services and shall make every reasonable effort to come to terms with the resident management corporation. An IHA shall document appropriately its reasons for rejecting any management contract offer from a resident management corporation, and must make the reasons available to the corporation.

(c) *Management Contract: scope.* (1) A management contract between the IHA and a resident management corporation is required for resident management. The IHA and the corporation may agree to the performance by the corporation of any or all management functions for which the IHA is responsible to HUD under the ACC, and any other functions

not inconsistent with the ACC and applicable laws and regulations.

(2) The management contract may include specific provisions governing management personnel; compensation for maintenance laborers and mechanics and administrative employees employed in the operation of the project, except that the amount of this compensation must meet applicable labor standard requirements of Federal law; rent collection procedures; resident income verification; resident eligibility determinations; resident eviction; the acquisition of supplies and materials; and such other matters as the IHA and the corporation determined to be appropriate, and as HUD may specify in administrative instructions.

(3) The management contract may permit a resident management corporation to conduct eligibility determinations (the number of persons in the household and their income) and income verifications. A resident management corporation also may participate in the screening of applicants and resident selection on an IHA-wide basis. In addition, the resident management corporation may screen applicants referred by the IHA for residence in the resident-managed project. The resident management corporation may make a recommendation to the IHA regarding the suitability of each such applicant, in accordance with screening criteria that are consistent with HUD guidelines and incorporated in the management contract. Standards for screening applicants shall be consistent with the requirements of title II of the Indian Civil Rights Act of 1968, 25 U.S.C. 1301-1303; the Indian Housing Act of 1988; Section 504 of the Rehabilitation Act of 1973; and all other applicable civil rights laws and executive orders. The resident management corporation's recommendation on a specific applicant shall be accepted by the IHA unless the IHA determines that action in accordance with the recommendation would be inconsistent with applicable laws.

(4) The management contract must be treated as a contracting out of services, and must be subject to any provision of a collective bargaining agreement regarding the contracting out of services to which the IHA is subject.

(5) Provisions on competitive bidding and requirements of prior written HUD approval of contracts contained in the annual contributions contract do not apply to the decision of an IHA to contract with a resident management corporation.

(d) *Management Contract: Contents.* At a minimum, the management contract

must contain provisions to satisfy the following requirements.

(1) Resident management corporation activities and expenditures must be consistent with the requirements of applicable Federal, State, and tribal law and regulations and with the ACC and IHA policies, including requirements pertaining to access to books and records, accounting, and audit.

(2) The amount of income expected to be derived from the project (from sources such as rents and charges) and the amount of income to be provided to the project from other sources of income of the IHA (such as operating subsidy under subpart J of this part, interest income, administrative fees, and rents) must be specified. The income estimates must be calculated on an IHA-wide basis, as well as for each category of income on which the IHA and the resident management corporation agree, consistent with HUD's administrative instructions. Income estimates may provide for proration of anticipated project income between the corporation and the IHA, based upon the management and other project-associated responsibilities (if any) that are to be retained by the IHA under the contract.

(3) The management corporation must submit to the IHA, for its approval, an annual budget or cost estimate covering activities under its contract with the IHA, identifying proposed activities and estimated costs associated with activities (if the IHA determines that the type of work contracted for makes this appropriate).

(4) The IHA must review periodically (but not less than annually) the management corporation's performance to ensure that it complies with all applicable requirements and meets agreed-upon standards of performance. (The method of review and criteria used to judge performance should be specified in the management contract.)

(5) The IHA and the management corporation each has the right to take all necessary and appropriate actions to remedy any breach of the contract by the other party, including the right to terminate the contract for cause.

(6) The IHA and the resident management corporation must reach agreement with respect to financial incentives, if applicable.

(7) All activities carried out pursuant to the management contract must be conducted in conformity with title II of the Indian Civil Rights Act of 1968, 25 U.S.C. 1301-1303; the Indian Housing Act of 1988; Section 504 of the Rehabilitation Act of 1973; and all other applicable civil rights laws and



executive orders. In addition, the management contract must indicate what record must be kept by the resident management corporation and made available to the IHA and HUD with respect to activities associated with resident management.

(e) *Prohibited activities.* An IHA may not contract for assumption by the resident management corporation of the IHA's underlying responsibilities to HUD under the ACC. The IHA must ensure that the overall operation of its projects is in compliance with all applicable Federal, State, and tribal requirements. The IHA must monitor the resident management corporation's performance under the management contract.

(f) *Bonding and insurance.* Before assuming any management responsibility under its contract, the resident management corporation must provide fidelity bonding and insurance, or equivalent protection that is adequate (as determined by HUD and the IHA) to protect HUD and the IHA against loss, theft, embezzlement, or fraudulent acts on the part of the corporation or its employees; and that meets such other requirements as may be specified by the IHA and in HUD's administrative instructions. The cost of such risk protection may be included in the management contract, and paid for as part of the operating budget.

(g) *Rights of families; operation of project.* If a resident management corporation is approved by the resident organization representing one or more buildings or an area of row houses that are part of an Indian housing project, the resident management program may not interfere with the rights of other residents of such project or harm the efficient operation of such project.

#### § 905.966 Continued IHA responsibility to HUD.

A management contract between the IHA and a resident management corporation does not impair the respective rights and responsibilities of the IHA and HUD under the ACC. The IHA remains responsible to HUD for ensuring that the management of its projects, including any management function contracted out to a resident management corporation, is in compliance with all applicable HUD requirements.

#### § 905.967 Management specialist.

(a) *Requirement for a management specialist.* If a resident organization seeks to manage a project, it must select, in consultation with the IHA, a qualified Indian housing management specialist to assist in determining the feasibility of,

and to help establish, a resident management corporation and to provide training and other duties in connection with the daily operations of the project.

(b) *Selection of an Indian housing management specialist.* In carrying out its responsibilities under paragraph (a) of this section, the resident organization must determine in advance the following:

(1) The qualifications that the management specialist must possess;

(2) The terms and conditions of the search and selection process;

(3) The duties and responsibilities to be performed by the management specialist, including the remuneration to be provided the specialist, a clear specification of the nature and degree of supervision to be provided the specialist, and a clear specification of the title of the person or persons in the organizational structure of the IHA or the resident organization (or both) to whom the specialist is to report for supervision and for evaluation of his or her performance; and

(4) Such other matters with respect to the selection and functions of the management specialist as the resident organization, in consultation with the IHA, may determine, consistent with the ACC and applicable law and regulations.

#### § 905.969 Modernization assistance.

(a) *Eligibility.* HUD may enter into a contract with the IHA to provide assistance under subpart I of this part to modernize a project managed by a resident management corporation under this subpart.

(b) *Administration of activities.* If the entirety of modernization activity referred to in paragraph (a) of this section (including the planning and architectural design of the rehabilitation) is administered by the resident management corporation, the IHA shall not retain, for any administrative or other reason, any portion of the modernization assistance provided, unless the IHA and the corporation provide otherwise by contract.

(c) *Consultation.* In assessing the modernization needs of its projects for purposes of CIAP or comprehensive grant application under subpart I of this part, IHAs must consult with the resident management corporation with reference to any project managed by the corporation, in order to determine the modernization needs of resident-managed projects. Evidence of this required consultation must be included with an IHA's initial submission to HUD.

#### § 905.970 Operating subsidy, preparation of operating budget, operating reserves and retention of excess revenues.

(a) *Calculation of operating subsidy.* Operating subsidy will be calculated separately for any project managed by a resident management corporation. This subsidy computation will be the same as the separate computation made for the balance of the projects in the IHA in accordance with subpart J of this part, with the following exceptions:

(1) The project managed by a resident management corporation will have an Allowable Expense Level based on the actual expenses for the project in the fiscal year immediately preceding management under this subpart. These expenditures will include the project's share of any expenses which are overhead or centralized IHA expenditures. The expenses must represent a normal year's expenditures for the project, and must exclude all expenditures which are not normal fiscal year expenditures as to amount or as to the purpose for which expended. Documentation of this expense level must be presented with the project budget and approved by HUD. Any project expenditures funded from a source of income other than operating subsidies or income generated by the locally owned Indian housing program will be excluded from the subsidy calculation. For budget years after the first budget year under management by the resident management corporation, the Allowable Expense Level will be calculated as it is for all other projects, in accordance with subpart J of this part.

(2) The resident management corporation project will estimate dwelling rental income based on the rent roll of the project immediately preceding the assumption of management responsibility under this subpart, increased by the estimate of inflation of resident income used in calculating PFS subsidy.

(3) The resident management corporation will exclude, from its estimate of other income, any increased income directly generated by activities of the corporation or facilities operated by the corporation.

(4) Any reduction in the subsidy of an IHA that occurs as a result of fraud, waste, or mismanagement by the IHA shall not affect the subsidy calculation for the resident management corporation project.

(b) *Calculation of total income and preparation of operating budget.* (1) Subject to paragraph (c) of this section, the amount of funds provided by an IHA to a project managed by a resident management corporation under this



subpart may not be reduced during the three-year period beginning on the date a resident management corporation first assumes management responsibility for the project.

(2) For purposes of determining the amount of funds provided to a project under paragraph (b)(1) of this section, the provision of technical assistance by the IHA to the resident management corporation will not be included.

(3) The resident management corporation and the IHA shall submit a separate operating budget, including the calculation of operating subsidy eligibility in accordance with paragraph (a) of this section, for the project managed by a resident management corporation to HUD for approval. This budget will reflect all project expenditures and will identify which expenditures are related to the responsibilities of the resident management corporation and which are related to functions which will continue to be performed by the IHA.

(4) *Operating reserves.* (i) Each project or part of a project that is operating in accordance with the ACC amendment relating to this subpart and in accordance with a contract vesting maintenance responsibilities in the resident management corporation will have transferred, into a sub-account of the operating reserve of the host IHA, an operating reserve. Where all maintenance responsibilities for the resident-managed project are the responsibility of the corporation, the amount of the reserve made available to projects under this subpart will be the per unit cost amount available in the IHA operating reserve, exclusive of all inventories, prepaids and receivables (at the end of the IHA fiscal year preceding implementation), multiplied by the number of units in the project operated in accordance with the provisions of this subpart. Where some, but not all, maintenance responsibilities are vested in the resident management corporation, the contract may provide for an appropriately reduced portion of the operating reserve to be transferred into the corporation's sub-account.

(ii) The use of the reserve will be subject to all administrative procedures generally applicable to the Indian housing program. Any expenditure of funds from the reserve will be for eligible expenditures which are incorporated into an operating budget subject to approval by HUD.

(iii) Investment of funds held in the reserve will be in accordance with the provisions of chapter 4 of the Financial Management Handbook, 7475.1 REV, and interest generated will be included

in the calculation of operating subsidy in accordance with subpart J of this part.

(c) *Adjustments to total income.* (1) Operating subsidy will reflect changes in inflation, utility rates and consumption, and changes in the number of units in the project.

(2) In addition to the amount of income derived from the project (from sources such as rents and charges) and the operating subsidy calculated in accordance with paragraph (a) of this section, the contract may specify that income be provided to the project from other sources of income of the IHA.

(3) The following conditions may not affect the amounts to be provided to a project managed by a resident management corporation under this subpart:

(i) Any reduction in the total income of an IHA that occurs as a result of fraud, waste, or mismanagement by the IHA; or

(ii) Any change in the total income of an IHA that occurs as a result of project-specific characteristics that are not shared by the project managed by the corporation under this subpart.

(d) *Retention of excess revenues.* Any income generated by a resident management corporation that exceeds the income estimated for the income category involved must be excluded in subsequent years in calculating:

(1) The operating subsidy provided to an IHA under subpart J of this part; and

(2) The funds provided by the IHA to the resident management corporation.

(e) *Use of retained revenues.* Any revenues retained by a resident management corporation under paragraph (d) of this section may only be used for purposes of improving the maintenance and operation of the project, establishing business enterprises that employ residents of Indian housing, or acquiring additional dwelling units for low-income families. Units acquired by the resident management corporation will not be eligible for payment of operating subsidy.

#### § 905.971 Waiver of HUD requirements.

(a) *Waiver conditions.* Upon the joint request of a resident management corporation and the IHA, HUD may waive any requirement that HUD has established and that is not required by law, if HUD determines, after consultation with the resident management corporation and the IHA, that the requirement unnecessarily increases the costs to the project or restricts the income of the project; and that the waiver would be consistent with the management contract and any applicable collective bargaining

agreement. Any waiver granted to a resident management corporation under this section will apply as well to the IHA to the extent the waiver affects the IHA's remaining responsibilities relating to the corporation's project.

(b) *Notice and opportunity for comment.* HUD may grant a waiver under paragraph (a) of this section only after requiring the IHA to provide notice to the residents whom the waiver would affect and giving them at least 30 days to comment on it. Notice may be served by any or all of the following means, as HUD determines appropriate:

(1) First class mail addressed to each affected resident;

(2) Delivery to the unit of each affected resident; or

(3) In the case of multi-family housing projects, posting in one or more conspicuous locations in any building in which affected residents live.

(c) *Role of IHAs and resident management corporations.* (1) All resident comments must be sent to the IHA. The IHA must summarize the comments, prepare (at its option) a recommended response to the comments, and provide the resident management corporation an opportunity to prepare a recommended response to the comments. The IHA must send to HUD all the resident comments received, along with the summary of comments prepared by the IHA and the recommendations (if any) of the IHA and the resident management corporation for the disposition of the comments.

(2) The IHA must carry out such responsibilities with respect to the determination of whether to grant a waiver under paragraph (a) of this section as HUD may prescribe in administrative instructions. These responsibilities will include the service of notice on affected residents under paragraphs (b) and (c) of this section.

(d) *Action on resident comments.* HUD will give careful consideration to all resident comments received within the comment period provided under paragraph (b) of this section. HUD, through the IHA, will provide written notice of its final decision on the proposed waiver, including written responses to the resident comments, served in the same manner and upon the same resident population as the original notice under paragraph (b) of this section was served.

(e) *Waiver to permit employment.* Upon the request of a resident management corporation, HUD may, subject to the terms and procedures of any applicable collective bargaining agreement, permit residents of the



project to volunteer a portion of their labor.

(f) *Exceptions.* HUD may not waive any regulatory or other requirement under paragraph (a) of this section with respect to the following:

- (1) Income eligibility for purposes of 905.301,
- (2) rental payments under 905.325,
- (3) resident or applicant protections under this Chapter or other applicable laws,
- (4) employee organizing rights, or
- (5) the rights of employees under collective bargaining agreements.

**§ 905.972 Audit and administrative requirements.**

(a) *Annual audit of books and records.* The financial statements of a resident management corporation managing a project under this subpart must be audited annually by a licensed certified public accountant, designated by the resident management corporation, in accordance with generally accepted government audit standards. A written report of each audit must be forwarded to HUD and the IHA within 30 days of issuance.

(b) *Relationship to other authorities.* The requirements of paragraph (a) of this section are in addition to any other Federal law or other requirement that would apply to the availability and audit of books and records of resident management corporations under this part.

(c) *General administrative requirements.* Except as modified by this part, resident management corporations must comply with the requirements of OMB Circulars A-110 and A-122, as applicable.

**§ 905.973 Technical assistance.**

(a) *Nature of assistance.* To the extent that grant authority is available, HUD will provide financial assistance to resident management corporations or resident organizations that obtain, by contract or otherwise, technical assistance for the development of resident management entities, including the formation of these entities; the development of the management capabilities of newly formed or existing entities; the identification of the social support needs of residents of projects, and the securing of this support; and a wide range of activities to further the purposes of this subpart. In determining the amount of any technical assistance grant, HUD will take into consideration the size of the resident-managed project and the anticipated complexity of the proposed change to resident management.

(b) *Maximum amount of assistance.* The assistance referred to in paragraph (a) of this section may not exceed \$100,000 with respect to any project.

**SUBPART P—SECTION 5(h) HOMEOWNERSHIP PROGRAM**

**§ 905.1001 Purpose.**

This subpart codifies the provisions of the section 5(h) Homeownership Program for Indian housing, as authorized by sections 5(h) and 6(c)(4)(D) of the United States Housing Act of 1937 (Act).

**§ 905.1002 Applicability.**

This subpart applies to low-income housing owned by Indian Housing Authorities (IHAs), subject to Annual Contributions Contracts (ACCs) under the Act. The terms *housing* or *low-income housing*, as used in this subpart, refer to the types of properties described in the preceding sentence, except as otherwise indicated by the particular context. In reference to housing properties, *development* means the same as "project" (as defined in the Act), rather than the statutory definition of "development". Except where otherwise indicated by the context, *resident* means the same as "tenant", as the latter term is used in the Act.

**§ 905.1003 General authority for sale.**

An IHA may sell all or a portion of a development to eligible purchasers, as defined under § 905.1008, for purposes of homeownership, according to a homeownership plan approved by the Department of Housing and Urban Development (HUD) under this subpart. If the development is subject to indebtedness under the ACC, HUD will continue to make any debt service contributions for which it is obligated under the ACC, and the property sold will not be subject to the encumbrance of that indebtedness. (In the case of a development with financing restrictions (such as a bond-financed development), however, sale is subject to the terms and conditions of the applicable restrictions.) Upon sale in accordance with the HUD-approved homeownership plan, HUD will execute a release of the title restrictions prescribed by the ACC. Because the property will no longer be subject to the ACC after sale, it will cease to be eligible for further HUD funding for operating subsidies or modernization under the Act, upon conveyance of title by the IHA. (That does not preclude any other types of post-sale subsidies that may be available, under other Federal, Tribal, State, or local programs, such as the possibility of available assistance under

section 8 of the Act, in connection with a plan for cooperative homeownership.)

**§ 905.1004 Fundamental criteria for HUD approval.**

HUD will approve an IHA's homeownership plan if it meets all three of the following criteria:

(a) The plan must be practically workable, with sound potential for long-term success. Financial viability, including the capability of purchasers to meet the financial obligations of homeownership, is a critical requirement.

(b) The plan must be consistent with law, including the requirements of this part and any other applicable Federal, Tribal, State, and local statutes and regulations, and existing contracts. Subject to the other three criteria stated in this section, any provision that is not contrary to those legal requirements may be included in the plan, at the discretion of the IHA, whether or not expressly authorized in this subpart.

(c) The plan must be clear and complete enough to serve as a working document for implementation, as well as a basis for HUD review. See § 905.1018 through 905.1021.

**§ 905.1005 Resident consultation and involvement.**

(a) In developing a proposed homeownership plan, and in carrying out the plan after HUD approval, the IHA shall consult with residents of the development involved, and with any resident organization that represents them, as necessary and appropriate to provide them with information and a reasonable opportunity to make their views and recommendations known to the IHA. While the Act gives the IHA sole legal authority for final decisions, as to whether or not to submit a proposed homeownership plan and the content of such a proposal, the IHA shall give residents and their resident organizations full opportunity for input in the homeownership planning process, and full consideration of their concerns and opinions.

(b) Where individual residents, a Resident Management Corporation (RMC), or another form of resident organization may wish to initiate discussion of a possible homeownership plan, the IHA shall negotiate with them in good faith. Joint development and submission of the plan by the IHA and RMC, or other resident organization, is encouraged. In addition, participation of a RMC or other resident organization in the implementation of the plan is encouraged.



(c) If the plan involves sale of 50 or more dwellings, or more than 10 percent of the total number of dwellings in the inventory of low-income housing that is owned or leased by the IHA, the IHA shall provide advance notice to residents and hold a public hearing prior to submission of the homeownership plan to HUD.

#### § 905.1006 Property that may be sold.

Subject to the workability criterion of § 905.1004(a) (including, for example, consideration of common elements and other characteristics of the property), a homeownership plan may provide for sale of one or more dwellings, along with interests in any common elements, comprising all or a portion of one or more housing developments. A plan may provide for conversion of existing rental housing to homeownership or for homeownership sale of newly developed housing. The property must meet local code requirements and the pertinent requirements for the elimination of lead-based paint hazards for HUD-associated housing, under subpart C of 24 CFR part 35. Further, the property must be in good repair, with the major components having a remaining useful life that is sufficient to justify a reasonable expectation that homeownership will be affordable by the purchasers. This standard must be met as a condition for sale of a dwelling to an individual purchaser, unless the terms of sale include measures to assure that the work will be completed within a reasonable time after purchase (e.g., as a part of a mortgage financing package that provides the purchaser with a home improvement loan).

#### § 905.1007 Methods of sale and ownership.

(a) Any appropriate method of sale and ownership may be used, such as fee-simple conveyance of single-family dwellings or conversion of multifamily buildings to resident-owned cooperatives or condominiums.

(b) An IHA may sell dwellings to residents directly or (with respect to multifamily buildings or a group of single-family dwellings) through another entity established and governed by, and solely composed of, residents of the IHA's low-income housing; provided that:

(1) The other entity has the necessary legal capacity and practical capability to carry out its responsibilities under the plan.

(2) The respective rights and obligations of the IHA and the other entity will be specified by a written agreement that includes:

(i) Assurances that the other entity will comply with all provisions of the HUD-approved homeownership plan.

(ii) Assurances that the IHA's conveyance of the property to the residents (through a resident entity) will be subject to a title restriction providing that the property may be resold or otherwise transferred only by conveyance of individual dwellings to eligible residents, in accordance with the HUD-approved homeownership plan, or by reconveyance to the IHA, and that the property will not be encumbered without the written consent of the IHA.

(iii) Protection against fraud or misuse of funds or other property on the part of the other entity, its employees, and agents.

(iv) Assurances that the resale proceeds will be used only for the purposes specified by the HUD-approved homeownership plan. (See § 905.1015.)

(v) Limitation of the other entity's administrative and overhead costs, and of any compensation or profit that may be realized by the entity, to amounts that are reasonable in relation to its responsibilities and risks.

(vi) Accountability to the IHA and residents for the recordkeeping, reporting and audit requirements of § 905.1017.

(vii) Assurances that the other entity will administer its responsibilities under the plan in accordance with applicable civil rights statutes and implementing regulations, as described in § 905.115.

(viii) Adequate legal remedies for the IHA and residents, in the event of the other entity's failure to perform in accordance with the agreement.

#### § 905.1008 Purchaser eligibility and selection.

Standards and procedures for eligibility and selection of the initial purchasers of individual dwellings shall be consistent with the following provisions:

(a) Subject to any additional eligibility and preference standards that are required or permitted under this section, a homeownership plan may provide for the eligibility of residents of low-income housing owned or leased by the seller IHA, subject to an ACC under the Act, and residents of other housing who are receiving housing assistance under section 8 of the Act, under an ACC administered by the seller IHA; provided that the resident has been in lawful occupancy for a minimum period specified in the plan (not less than 30 days prior to conveyance of title to the dwelling to be purchased). Within that overall range of permissible eligibility,

the following order of preference shall be observed:

(1) The existing residents of each of the dwellings to be sold.

(2) Other residents of the building or development in which the dwellings to be sold are located.

(3) Residents of the IHA's other low-income housing developments (owned or leased by the seller IHA).

(4) Residents of other housing who are receiving housing assistance under section 8 of the Act, under an ACC administered by the seller IHA.

(5) Other persons who do not meet any of the types of residency requirements listed in paragraphs (a) (1) through (4) of this section at the time of their selection as purchasers, provided that they are eligible for admission to low-income housing and their selection is conditioned on completion of the specified minimum period of rental tenancy prior to conveyance of title.

(b) A homeownership plan may restrict eligibility to one or more of the preference categories listed in paragraph (a) of this section, as may be reasonable in view of the number of units to be offered for sale and the estimated number of eligible applicants in successive categories, provided that the specified order of those preferences is observed.

(c) Within each of the categories under paragraph (a) of this section, a preference shall be given to those residents who have completed self-sufficiency and job training programs, as identified in the homeownership plan, or who meet equivalent standards of economic self-sufficiency, such as actual employment experience, as specified in the homeownership plan.

(d) Residents who are interested in purchase must submit applications for that specific purpose, and those applications shall be handled separately from applications for other IHA programs. Applications shall be dated as received by the IHA, and, subject to eligibility and preference factors, selection shall be made in the order of receipt. Application for homeownership shall not affect an applicant's place on any other IHA waiting list.

(e) Eligibility shall be limited to residents who are capable of assuming the financial obligations of homeownership, under minimum income standards for affordability, taking into account the unavailability of operating subsidies and modernization funds after conveyance of the property by the IHA. A homeownership plan may, however, take account of any available subsidy from other sources (e.g., if available, assistance under section 8 of the Act, in



connection with a plan for cooperative ownership). Under this affordability standard, an applicant must meet both of the following requirements:

(1) On an average monthly estimate, the amount of the purchaser's payments for mortgage principal and interest, plus insurance and real estate taxes, will not exceed the sum of:

(i) 30 percent of the applicant's adjusted income, as defined in this part, and

(ii) Any subsidy that will be available for such payments. Where justified, a higher percentage of adjusted income may be used, up to a maximum of 35 percent. In addition, expenses such as utilities, maintenance, and other debt must be taken into account.

(2) The applicant can pay any amounts required for closing, such as a downpayment (if any) and closing costs chargeable to the purchaser, as may be specified in the homeownership plan.

(f) Eligibility shall be limited to residents who have been current in all of their lease obligations over a period of not less than six months prior to conveyance of title, including, but not limited to, payment of rents and other charges and reporting of all income that is pertinent to determination of rental charges. At the IHA's discretion, the homeownership plan may allow a resident to remedy underreporting of income by payment of the resulting underpayments for rent (back rent owing) prior to conveyance of title to the homeownership dwelling, either in a lump-sum or in installments over a reasonable period. Alternatively, the plan may permit payment within a reasonable period after conveyance of title, under an agreement secured by a mortgage on the property.

(g) If consistent with paragraphs (a) through (f) of this section, a homeownership plan may include any other standards for eligibility or preference, or both, that are not contrary to law, at the discretion of the IHA.

#### **§ 905.1009 Counseling, training, and technical assistance.**

Appropriate counseling shall be provided to prospective and actual purchasers, as necessary for each stage of implementation of the homeownership plan. Particular attention must be given to the terms of purchase and financing, along with the other financial and maintenance responsibilities of homeownership. In addition, where applicable, appropriate training and technical assistance shall be provided to any entity (such as a RMC, other resident organization, or a cooperative or condominium entity) that

has responsibilities for carrying out the plan.

#### **§ 905.1010 Nonpurchasing residents.**

(a) If an existing resident of a dwelling authorized for sale under a homeownership plan is ineligible for purchase, or declines to purchase, the resident shall be given the choice of relocation to other suitable and affordable housing or continued occupancy of the present dwelling on a rental basis, at a rent no higher than that permitted by the Act. Displacement (permanent, involuntary move), in order to make a dwelling available for sale, is prohibited. In addition to applicable program sanctions, a violation of the displacement prohibition may trigger a requirement to provide relocation assistance in accordance with the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 and implementing government-wide regulations (49 CFR part 24). Where continued rental occupancy is contemplated, the homeownership plan must include provision for any rental subsidy required (e.g., section 8 assistance, if available). As soon as feasible after they can be identified, all nonpurchasing residents shall be given written notice of their options under this section.

(b) A resident who chooses to relocate pursuant to this section shall be offered the opportunity to relocate to another decent, safe, sanitary and affordable dwelling of suitable size, which is, to the maximum extent practicable, of the resident's choice, in accordance with applicable civil rights statutes and implementing regulations, as specified in § 905.115. This requirement will be met if the resident is offered the opportunity to relocate to a suitable dwelling in other low-income housing owned or leased by the IHA, any of the housing assistance programs under section 8 of the Act, or any other Federal, Tribal, State, or local program that is comparable, as to standards for housing quality, admission and rent, to the programs under the Act, and provides a term of assistance of at least five years.

(c) A resident who chooses to relocate pursuant to this section shall be offered the following relocation assistance:

(1) Counseling and advisory services to assure full choices and real opportunities to obtain relocation within a full range of neighborhoods where suitable housing may be found, including and outside areas of minority concentration, including timely information, an explanation of the resident's rights under the applicable civil rights statutes and regulations, and referrals to other housing that meets the

standards of paragraph (b) of this section; and

(2) Payment for actual, reasonable moving expenses.

#### **§ 905.1011 Maintenance reserve.**

(a) A maintenance reserve shall be established for multifamily housing sold under a homeownership plan. For single-family dwellings, a maintenance reserve shall not be required, if the availability of the funds needed for maintenance is adequately addressed under the affordability standard adopted in accordance with § 905.1008(e).

(b) The purpose of the maintenance reserve shall be to provide a source of reserve funds for maintenance, repair and replacement, as necessary to ensure the long-term success of the plan, including protection of the interests of purchasers and the IHA. The amounts to be set aside, and other terms of this reserve, shall be as necessary and appropriate for the particular homeownership plan, taking into account such factors as prospective needs for nonroutine maintenance and replacement, the homeowner's financial resources, and any special factors that may aggravate or mitigate the need for a maintenance reserve.

#### **§ 905.1012 Purchase prices and financing.**

(a) To ensure affordability by eligible purchasers, by the standard adopted under § 905.1008(e), a homeownership plan may provide for below-market purchase prices or below-market financing, or a combination of the two. Discounted purchase prices may be determined on a unit-by-unit basis, based on the particular purchaser's ability to pay, or may be determined by any other fair and reasonable method (e.g., uniform prices for a group of comparable dwellings, within a range of affordability by a group of potential purchasers).

(b) Any type of private or public financing may be used (e.g., conventional, Federal Housing Administration (FHA), Department of Veterans Affairs (VA), Farmers Home Administration (FmHA), or a Tribal, State or local program). An IHA may finance or assist in financing purchase by any methods it may choose, such as purchase-money mortgages, guarantees of mortgage loans from other lenders, shared equity, or lease-purchase arrangements.

#### **§ 905.1013 Protection against fraud and abuse.**

A homeownership plan shall include appropriate protections against any risks of fraud or abuse that are



presented by the particular plan, such as collusive purchase for the benefit of nonresidents, extended use of the dwelling by the purchaser as rental property, or collusive sale that would circumvent the resale profit limitation of § 905.1014.

**§ 905.1014 Limitation of resale profit.**

(a) *General.* If a dwelling is sold to the initial purchaser for less than fair market value, the homeownership plan shall provide for appropriate measures to preclude realization of windfall profit on resale. *Windfall profit* means all or a portion of the resale proceeds attributable to the purchase price discount (the fair market value at date of purchase from the IHA less the below-market purchase price), as determined by one of the methods described in paragraphs (b) through (d) of this section. Subject to that requirement, however, purchasers should be permitted to retain any resale profit attributable to appreciation in value after purchase, along with any portion of the sale proceeds fairly attributable to improvements made by them after purchase.

(b) *Promissory note method.* Where there is no limit on the amount of the resale price, the initial purchaser shall execute a promissory note, payable to the IHA, along with a mortgage securing the obligation of the note, on the following terms and conditions:

- (1) The principal amount of indebtedness shall be the lesser of:
  - (i) The purchase price discount, as determined by the definition in paragraph (a) of this section and stated in the note as a dollar amount; or
  - (ii) The net resale profit, in an amount to be determined upon resale by a formula stated in the note. That formula shall define net resale profit as the amount by which the gross resale price exceeds the sum of:
    - (A) The discounted purchase price;
    - (B) Reasonable sale costs charged to the initial purchaser upon resale; and
    - (C) Any increase in the value of the property that is attributable to improvements paid for or performed by the initial purchaser during tenure as a homeowner.

(2) At the option of the IHA, the note may provide for automatic reduction of the principal amount over a specified period of ownership while the property is used as the purchaser's family residence. At maximum, this may result in total forgiveness of the indebtedness over a period of not less than five years from the date of conveyance, in annual increments of not more than 20 percent. This does not require an IHA's plan to provide for any such reduction at all, or

preclude it from specifying terms that are less generous to the purchaser than those stated in the foregoing sentence.

(3) To preclude collusive resale that would circumvent the intent of this section, the IHA shall (by an appropriate form of title restriction) condition the initial purchaser's right to resell upon approval by the IHA, to be based solely on the IHA's determination that the resale price represents fair market value or a lesser amount that will result in payment to the IHA, under the note, of the full amount of the purchase price discount (subject to any accrued reduction, if provided for under subparagraph (b)(2) of this section). If so determined, the IHA shall be obligated to approve the resale.

(4) The IHA may, in its sole discretion, agree to subordination of the mortgage that secures the promissory note, in favor of an additional mortgage given by the purchaser as security for a home improvement loan.

(c) *Limited equity method.* As a second option, the requirement of this section may be satisfied by an appropriate form of limited equity arrangement, restricting the amount of net resale profit that may be realized by the seller (the initial purchaser and successive purchasers over a period prescribed by the homeownership plan) to the sum of:

- (1) The seller's paid-in equity;
- (2) The portion of the resale proceeds attributable to any improvements paid for or performed by the seller during homeownership tenure; and
- (3) An allowance for appreciation in value, calculated by a fair and reasonable method specified in the homeownership plan (e.g., according to a price index factor or other measure).

(d) *Third option.* The requirements of this section may be satisfied by any other fair and reasonable arrangement that will accomplish the essential purposes stated in paragraph (a) of this section.

(e) *Appraisal.* Determinations of fair market value under this section shall be made on the basis of appraisal by an independent appraiser, to be selected by the IHA.

**§ 905.1015 Use of sale proceeds.**

(a) *General authority for use.* Sale proceeds may, after provision for sale and administrative costs that are necessary and reasonable for carrying out the homeownership plan, be retained by the IHA and used for housing assistance to low-income families (as such families are defined under the Act). The term "sale proceeds" includes all payments made by purchasers for credit to the purchase

price (e.g., earnest money, down payments, payments out of the proceeds of mortgage loans, and principal and interest payments under purchase-money mortgages), along with any amounts payable upon resale under § 905.1013, and interest earned on all such receipts. (Residual receipts, as defined in the ACC, shall not be treated as sale proceeds.)

(b) *Permissible uses.* Sale proceeds may be used for any one or more of the following forms of housing assistance for low-income families, at the discretion of the IHA and as stated in the HUD-approved homeownership plan:

(1) In connection with the homeownership plan from which the funds are derived, for special purposes that are justified to ensure the success of the plan, and to protect the interests of the IHA and residents. Examples include a reserve for use to prevent or cure default; a reserve for emergency loans to homeowners; a reserve for any contingent liabilities (such as guaranty of mortgage loans); and a reserve for repurchase, repair and resale of homes in the event of defaults.

(2) In connection with another HUD-approved homeownership plan under this part, for assistance to purchasers and for reasonable planning and administrative costs.

(3) In connection with a Tribal, State, or local homeownership program for low-income families, for assistance to purchasers and for reasonable planning and administrative costs. Under such programs, sales proceeds may be used to construct or acquire additional dwellings for sale to low-income families, or to assist such families in purchasing other dwellings from public or private owners. Where this kind of use is proposed, the homeownership plan must include a description of the Tribal, State, or local homeownership program.

(4) In connection with the IHA's other low-income housing (developments that remain under ACC), for any purposes authorized for the use of operating funds under the ACC and applicable provisions of the Act and regulations, as included in the HUD-approved operating budgets. Examples include maintenance and modernization, augmentation of operating reserves, protective services, and resident services. Such use shall not result in the reduction of the operating subsidy otherwise payable to the IHA for its other low-income housing.

(5) In connection with any other type of Federal, Tribal, State, or local housing program for low-income families.



**§ 905.1016 Replacement housing.**

(a) As a condition for transfer of ownership of any property under a HUD-approved homeownership plan, the IHA must obtain a funding commitment, from HUD or another source, for the replacement of each of the dwellings to be sold under the plan. Replacement housing may be provided by one or any combination of the following methods:

(1) Development by the IHA of additional low-income housing (by new construction or acquisition).

(2) Rehabilitation of vacant low-income housing owned by the IHA.

(3) Use of five-year, tenant-based certificate or voucher assistance under section 8 of the Act.

(4) If the homeownership plan is submitted by the IHA for sale to residents through a RMC, resident council or cooperative association which is otherwise eligible to participate under this part, acquisition of nonpublicly owned housing units, which the RMC, resident council or cooperative association will operate as rental housing, comparable to IHA-owned low-income housing as to term of assistance, housing standards, eligibility and contribution to rent.

(5) Any other Federal, Tribal, State, or local housing program that is comparable, as to housing standards, eligibility and contribution to rent, to any of the programs referred to in paragraphs (a) (1) through (3) of this section, and provides a term of assistance of not less than five years.

(b) Although a HUD funding commitment is required if the replacement housing requirement is to be satisfied through any of the HUD programs listed in paragraph (a) of this section, HUD shall not be obligated to provide such funding until the commitment is issued. Where the requirement is to be satisfied under a Tribal, State or local program, or a Federal program not administered by HUD, a funding commitment shall be required from the proper authority. Sale proceeds may be used for some of the replacement housing options under paragraph (a) of this section (e.g., rehabilitation of vacant IHA-owned housing, or an eligible local program). Where a homeownership plan provides for use of sale proceeds, HUD approval of the plan and execution of the IHA-HUD implementing agreement under § 905.1019 shall satisfy the funding commitment requirement of paragraph (a), with regard to the amount of replacement housing to be funded out of sale proceeds.

(c) Replacement housing may differ from the dwellings sold under the

homeownership plan, as to unit sizes or family or elderly occupancy, as consistent with local housing needs for low-income families.

(d) This section shall not apply to applications submitted under the Section 5(h) Homeownership Program prior to October 1, 1990.

**§ 905.1017 Records, reports, and audits.**

The IHA shall be responsible for the maintenance of records (including sales and financial records) for all activities incident to implementation of the HUD-approved homeownership plan. Until all planned sales of individual dwellings have been completed, the IHA shall submit to HUD annual sales reports, in a form prescribed by HUD. The receipt, retention, and use of the sale proceeds shall be covered in the regular independent audits of the IHA's low-income housing operations, and any supplementary audits that HUD may find necessary for monitoring. Where another entity is responsible for sale of individual units, pursuant to § 905.3007(b), the IHA must ensure that the entity's responsibilities include proper recordkeeping and accountability to the IHA, sufficient to enable the IHA to monitor compliance with the approved homeownership plan, to prepare its reports to HUD, and to meet its audit responsibilities. All books and records shall be subject to inspection and audit by HUD and the General Accounting Office (GAO).

**§ 905.1018 Submission and review of homeownership plan.**

Whether to develop and submit a proposed homeownership plan is a matter within the discretion of each IHA. An IHA may initiate a proposal at any time, according to the following procedures:

(a) Before submission of a proposed plan, the IHA shall consult informally with the appropriate HUD Regional or Field Office to assess feasibility and the particulars to be addressed by the plan.

(b) The IHA shall submit the proposed plan, together with supporting documentation, to the appropriate HUD Regional or Field Office.

(c) Conditional approval may be given, at HUD discretion, in instances where HUD determines that to be justified. For example, conditional HUD approval might be a necessary precondition for the IHA to obtain the funding commitments required to satisfy all of the requirements for final HUD approval of a complete homeownership plan. Where conditional approval is granted, HUD will specify the conditions in writing.

**§ 905.1019 HUD approval and IHA-HUD implementing agreement.**

Upon HUD notification to the IHA that the homeownership plan is approvable (in final form that satisfies all applicable requirements of this subpart), the IHA and HUD will execute a written agreement, in a form prescribed by HUD, to evidence HUD approval and authorization for implementation. The plan itself, as approved by HUD, shall be considered to be part of the agreement. Any of the items of supporting documentation may also be incorporated, if agreeable. The IHA shall be obligated to carry out the approved plan without modification, except with written approval by HUD.

**§ 905.1020 Content of homeownership plan.**

The homeownership plan must address the following matters, as applicable to the particular factual situation:

(a) A description of the property, including identification of the development and the specific dwellings to be sold.

(b) If applicable, a plan for any repair or rehabilitation required under § 905.1006, based on the assessment of the physical condition of the property that is included in the supporting documentation.

(c) Purchaser eligibility and selection (see § 905.1008).

(d) Terms and conditions of sale (see, particularly, §§ 905.1011 through 905.1014).

(e) A plan for consultation with residents during the implementation stage. (See § 905.1005). If appropriate, this may be combined with the plan for counseling.

(f) A budget estimate, showing the costs of implementing the plan, and the sources of the funds that will be used.

(g) Counseling, training, and technical assistance to be provided in accordance with § 905.1009.

(h) If the plan contemplates sale to residents via an entity other than the PHA, a description of that entity's responsibilities and information demonstrating that the requirements of § 905.1007(b) have been met or will be met in a timely fashion.

(i) If applicable, a plan for nonpurchasing residents, in accordance with § 905.1010.

(j) An administrative plan, including estimated staffing requirements.

(k) An estimate of the sale proceeds and an explanation of how they will be used, in accordance with § 905.1015.

(l) A description of the accounting and reporting procedures to be used.



including those required to meet the requirements of § 905.1017.

(m) A replacement housing plan, in accordance with § 905.1016.

(n) An estimated timetable for the major steps required to carry out the plan.

#### § 905.1021 Supporting documentation.

The following supporting documentation shall be submitted to HUD with the proposed homeownership plan, as appropriate for the particular plan:

(a) An estimate of the fair market value of the property, including the range of fair market values of individual dwellings, supported by such information as HUD finds sufficient to support the estimate.

(b) An assessment of the physical condition of the property, based on the standards specified in § 905.1006.

(c) A statement demonstrating the practical workability of the plan, based on analysis of data on such elements as purchase prices, costs of repair or rehabilitation, homeownership costs, family incomes, availability of financing, and the extent to which there are eligible residents who are expected to be interested in purchase. (See § 905.1004(a).)

(d) Information to substantiate the commitment and capability of the IHA and any other entity with substantial responsibilities for implementing the plan.

(e) A description of resident consultation activities carried out pursuant to Sec. 905.1005 before submission of the plan (including public hearing, if required), with a summary of the views and recommendations of residents and copies of any written comments that may have been submitted to the IHA by individual residents, resident organizations, and any other individuals and organizations.

(f) The IHA's certification that it will administer the plan in accordance with applicable civil rights laws and implementing regulations, as described in § 905.115 of this part, and will assure compliance with those requirements by any other entity that may assume substantial responsibilities for implementing the plan.

(g) An opinion by legal counsel to the IHA, stating that counsel has reviewed the plan and finds it consistent with all applicable requirements of Federal, Tribal, State, and local law, including regulations as well as statutes. In addition, counsel must identify the major legal requirements that remain to be met in implementing the plan, indicating an opinion about whether

those requirements can be met without special problems that may disrupt the timetable or other features contained in the plan.

(h) A resolution by the IHA's Board of Commissioners, evidencing its approval of the plan.

(i) Any other information that may reasonably be required for HUD review of the plan. Except for the IHA-HUD implementing agreement under § 905.1019, HUD approval is not required for documents to be prepared and used by the IHA in implementing the plan (such as contracts, applications, deeds, mortgages, promissory notes, leases, and cooperative or condominium documents), if their essential terms and conditions are described in the plan. Consequently, those documents need not be submitted as part of the plan or the supporting documentation.

#### PART 965—PHA-OWNED OR LEASED PROJECTS—MAINTENANCE AND OPERATION

2. The authority citation for part 965 continues to read as follows:

Authority: Secs. 2, 3, 6, 9, United States Housing Act of 1937 (42 U.S.C. 1437, 1437a, 1437d, 1437g); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subpart H is also issued under the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846).

#### § 965.101 [Amended]

3. In § 965.101, paragraph (d) is amended by removing the period at the end of the last sentence, and adding the following clause, ", but not to work or contracts administered by Indian Housing Authorities (for which, see part 905 of this chapter)."

4. Section 965.302 is revised to read as follows:

#### § 965.302 Applicability.

The provisions of this subpart apply to all PHAs with PHA-owned housing, but they do not apply to Indian Housing Authorities. (For similar provisions applicable to Indian Housing, see part 905 of this chapter.) No PHA-leased project or Section 8 Housing Assistance Payments Program project, including PHA-owned Section 8 projects, is covered by this subpart.

#### § 965.401 [Amended]

5. In § 965.401, the phrase "title I of" is added before the phrase "the U.S. Housing Act of 1937".

6. Section 965.471 is revised to read as follows:

#### § 965.471 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart applies to

Public Housing, including the Turnkey III Homeownership Opportunities Program. This subpart also applies to units assisted under sections 10(c) and 23 of the U.S. Housing Act of 1937 as in effect before amendment by the Housing and Community Development Act of 1974 and to which part 900 is not applicable.

(b) This subpart does not apply to dwelling units in Turnkey III projects operated by Indian Housing Authorities or other Indian Housing projects (for which see part 905, subpart K). It also does not apply to dwelling units that are served by PHA-furnished utilities, unless checkmeters have been installed to measure the actual utilities consumption of the individual units—except that tenants in such units shall be subject to charges for consumption of tenant-owned major appliances, or for optional functions of PHA-furnished equipment, in accordance with § 965.477(b).

#### § 965.472 [Amended]

7. In § 965.472, the definition of "Public Housing Agency" is amended by removing the last sentence.

8. Section 965.701 is revised to read as follows:

#### § 965.701 Purpose and applicability.

The purpose of this subpart is to implement the provisions of section 302 of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846) by establishing procedures to eliminate as far as practicable the immediate hazards from the presence of paint that may contain lead in PHA-owned housing assisted under the United States Housing Act of 1937. This subpart applies to PHA-owned lower-income public housing projects, including Turnkey III, conveyed Lanham Act and Public Works Administration projects, and to section 23 Leased Housing Bond-Financed projects. This subpart does not apply to projects under the Section 23 and Section 8 Housing Assistance Payments programs, or to Indian Housing. This subpart is promulgated pursuant to the authorization granted in 24 CFR 35.24(b)(4) and supersedes, with respect to all housing to which it applies, the requirements prescribed by subpart C of 24 CFR part 35.

Dated: June 5, 1992.

Joseph G. Schiff,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 92-14057 Filed 6-23-92; 8:45 am]

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Wednesday  
June 24, 1992

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## Part III

### Department of Commerce

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#### International Trade Administration

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Antidumping; Antifriction Bearings (Other  
Than Tapered Roller Bearings) and Parts  
From France, et al.; Notice



## DEPARTMENT OF COMMERCE

## International Trade Administration

[A-427-801, et al.]

**Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews**

In the matter of A-427-801, A-428-801, A-475-801, A-588-804, A-485-801, A-559-801, A-401-801, A-549-801, A-412-801.

**AGENCY:** International Trade Administration/Import Administration Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative reviews.

**SUMMARY:** On March 31, 1992, the Department of Commerce published the preliminary results of its administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof, from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof, as described in more detail below. The reviews cover 63 manufacturers/exporters and the period May 1, 1990 through April 30, 1991.

Based on our analysis of the comments received, we have changed the preliminary results to account for certain changes in the margin calculations proposed by interested parties and to correct certain inadvertent programming and clerical errors. The final margins for the reviewed firms for each class or kind of merchandise are listed below in the section "Final Results of Review."

**EFFECTIVE DATE:** June 24, 1992.

**FOR FURTHER INFORMATION CONTACT:** The appropriate case analyst, for the various respondent firms listed below, at the Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-4733.

*France*

Amy Beargie (FiatAvio S.p.A., Aerospatiale Division Helicopteres), Lisa Boykin (Dassault Industries), Michael Diminich (SKF France), Carlo Cavagna (SNECMA, Turbomeca), Maureen McPhillips (INA Roulements S.A., SNR Roulements S.A.) Thomas

McGinty (SNFA), Anna Snider (Messerschmitt-Boelkow-Blohm GmbH, Pratt & Whitney Canada Inc.), or Richard Rimlinger.

*Germany*

Amy Beargie (FiatAvio S.p.A., Aerospatiale Division Helicopteres), J. David Dirstine (SKF GmbH, George Mueller Nurnberg AG), Joseph Hanley (NTN Kugellagerfabrik (Deutschland) GmbH), Maureen McPhillips (INA Walzlager Schaeffler KG), Breck Richardson (Neuweg Fertigung GmbH), Michael Rill (FAG Kugelfischer George Schaefer KGaA), Anna Snider (Messerschmitt-Boelkow-Blohm GmbH, Pratt & Whitney Canada Inc.), or Richard Rimlinger.

*Italy*

Amy Beargie (FiatAvio S.p.A., Aerospatiale Division Helicopteres), Carlo Cavagna (SNECMA), Michael Diminich (SKF Industrie S.p.A.), Thomas McGinty (FAG Cuscinetti S.p.A.), Breck Richardson (Meter S.p.A.), Anna Snider (Rolls-Royce), or Richard Rimlinger.

*Japan*

Jacqueline Arrowsmith (Showa Pillow Block Mfg. Ltd., Takeshita Seiko Co., Uchiyama Mfg. Corp., Wada Seiko Co. Ltd.), Sheila Baker (Inoue Jikuuke Kogyo Co., Nakai Bearing Co. Ltd., Nippon Seiko K.K.), Thomas Barlow (Honda Motor Co. Ltd., Osaka Pump Co. Ltd., Yamaha Motor Co.), Amy Beargie (FiatAvio S.p.A.), Kris Campbell (Izumoto Seiko Co. Ltd., Maehara Ironworks Co. Ltd., Tottori Yamakai Bearing Seisakusho Ltd.), Robert Hamilton (Fujino Iron Works Co. Ltd., Koyo Seiko Co. Ltd., Nachi-Fujikoshi Corp., Nankai Bearing Co. Ltd.), Joseph Hanley (Asahi Seiko Co. Ltd.), Albert Hayes (NTN Corp.), Laurel Lynn (Nippon Pillow Block Sales Co.), Anna Snider (Messerschmitt-Boelkow-Blohm GmbH), or Laurel LaCivita and Richard Rimlinger.

*Romania*

Breck Richardson (Tehnoimportexport), or Richard Rimlinger.

*Singapore*

Laurel Lynn (NMB Singapore Ltd. and Pelmech Industries (Pte.) Ltd.), or Laurel LaCivita.

*Sweden*

Lisa Boykin (SKF Sverige), or Richard Rimlinger.

*Thailand*

Laurel Lynn (NMB Thai Ltd. and Pelmech Thai Ltd.), or Laurel LaCivita.

*United Kingdom*

Amy Beargie (FiatAvio S.p.A.), Lisa Boykin (SKF (U.K.) Ltd.), Thomas McGinty (FAG U.K. Ltd., Barden Corp.), Maureen McPhillips (INA Bearing Co. Ltd.), Michael Rill (RHP Bearings), Joanna Schlesinger (Cooper Bearings Ltd.), Anna Snider (Pratt & Whitney Canada Inc.), or Richard Rimlinger.

**SUPPLEMENTARY INFORMATION:****Background**

On March 31, 1992, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of its administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof (AFBs) from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom (57 FR 10859-10881). We gave interested parties an opportunity to comment on our preliminary results.

At the request of certain interested parties, we held a public hearing on general issues pertaining to all nine countries on April 20, 1992, and a hearing on issues pertaining to Japan on April 24, 1992.

**Issues Appendix**

All issues raised in the case and rebuttal briefs by parties to the 18 concurrent administrative reviews of AFBs are addressed in the "Issues Appendix" which is appended to this notice of final results. The first part of the Issues Appendix consists of all general issues raised in these reviews and our determinations with respect to each issue. The next part addresses all remaining comments filed by the parties to these proceedings. See the Table of Contents to the Issues Appendix for a complete listing of the issue topics and the order in which they are addressed.

**Scope of Reviews**

The products covered by these reviews are antifriction bearings (other than tapered roller bearings), and parts thereof, and constitute the following "classes or kinds" of merchandise: Ball bearings and parts thereof (BBs), cylindrical roller bearings and parts thereof (CRBs), and spherical plain bearings and parts thereof (SPBs). For a detailed description of the products covered under these classes or kinds of merchandise, including a compilation of all pertinent scope determinations, see the "Scope of the Orders" section in the Issues Appendix.



**Best Information Available**

In accordance with section 776(c) of the Tariff Act of 1930, as amended (the Tariff Act), we have determined that the use of the best information otherwise available (BIA) is appropriate for a number of firms. For certain firms, total BIA was necessary, while for other firms, only partial BIA was applied. For a discussion of our application of BIA, see the "Best Information Available" section in the Issues Appendix.

**Changes Since the Preliminary Results**

Based on our analysis of comments received, we have made the following changes in these final results.

- Where applicable, certain programming and clerical errors in our preliminary results have been corrected. Any alleged programming or clerical errors pertaining to the calculation and treatment of charges and adjustments, cost of production and constructed value with which we do not agree are discussed in the relevant sections of the Issues Appendix.

- Based on our analysis of comments filed by parties to these proceedings, we have modified or altered our treatment of certain charges and adjustments. These modifications or alternations are discussed in the relevant sections of the Issues Appendix.

- In the preliminary results, we compared U.S. and home market sales without applying a 20 percent difference in merchandise (difmer) cap. However, as a result of comments received, we have used the 20 percent difmer cap in these final results. See the "Model Match" section of the Issues Appendix.

- In the preliminary results, we compared a company's U.S. and home market sales without distinguishing between its sales of merchandise produced by different manufacturers. However, as a result of comments received, we have compared only sales produced by the same manufacturer. See the "Model Match" section of the Issues Appendix.

**Analysis of Comments Received**

See the Issues Appendix attached to this notice.

**Final Results of Reviews**

We determine the following percentage margins to exist for the period May 1, 1990 through April 30, 1991:

Company	BBs	CRBs	SPBs
<b>France</b>			
ADH	7.17	3.05	5.06

Company	BBs	CRBs	SPBs
Dassault	11.42	2.34	2.33
FiatAvio	.15		2
INA	66.42	18.37	42.79
MBB	.19	( <sup>1</sup> )	42.79
Pratt & Whitney	14.13	6.39	( <sup>2</sup> )
SKF	9.03	( <sup>1</sup> )	
SNFA	66.42	18.37	( <sup>2</sup> )
SNR	11.27	18.37	( <sup>2</sup> )
SNECMA	6.20	1.89	( <sup>2</sup> )
Turbomeca	6.76	6.52	( <sup>1</sup> )
All Others	14.13	6.52	42.79

**Germany**

ADH	24.02	4.57	( <sup>1</sup> )
FAG	18.41	7.63	-1.90
FiatAvio	4.14	24.82	( <sup>2</sup> )
GMN	.29	( <sup>1</sup> )	( <sup>1</sup> )
INA	12.11	17.38	( <sup>1</sup> )
MBB	1.32		.63
NWG	6.69	( <sup>2</sup> )	( <sup>2</sup> )
NTN		( <sup>1</sup> )	( <sup>1</sup> )
Pratt & Whitney	13.15	8.93	( <sup>2</sup> )
SKF	12.40	10.92	1.92
All Others	24.02	24.82	1.92

**Italy**

ADH	.24	7.74	
FAG	6.14	( <sup>1</sup> )	
FiatAvio	3.13	13.52	
Meter	8.32	( <sup>1</sup> )	
Rolls-Royce	( <sup>2</sup> )		
SKF	10.00		
SNECMA		3.53	
All Others	10.00	13.52	

**Japan**

Asahi	.01	( <sup>2</sup> )	( <sup>2</sup> )
FiatAvio	2.33	5.02	( <sup>2</sup> )
Fujino	1.80	( <sup>2</sup> )	( <sup>2</sup> )
Honda	.04		
IJK	8.26		( <sup>2</sup> )
Izumoto	12.18	( <sup>2</sup> )	( <sup>2</sup> )
Koyo	8.89	1.40	
Maehara	( <sup>2</sup> )	( <sup>2</sup> )	.57
MBB	( <sup>1</sup> )	( <sup>1</sup> )	
Minebea	106.61	51.82	92.00
Nachi	7.85	22.73	( <sup>1</sup> )
Nakai	6.36	( <sup>2</sup> )	( <sup>2</sup> )
Nankai	9.22	( <sup>2</sup> )	( <sup>2</sup> )
NPBS	45.83	( <sup>1</sup> )	( <sup>1</sup> )
NSK	7.22	14.34	( <sup>1</sup> )
NTN	2.24	2.63	.50
Osaka Pump	.89	( <sup>2</sup> )	( <sup>2</sup> )
Showa	7.31	( <sup>2</sup> )	( <sup>2</sup> )
Takeshita	.84	( <sup>2</sup> )	( <sup>2</sup> )
Tottori	3.29	( <sup>2</sup> )	( <sup>2</sup> )
Uchiyama	45.83	( <sup>2</sup> )	( <sup>2</sup> )
Wada	16.71	( <sup>2</sup> )	( <sup>2</sup> )
Yamaha	45.83	( <sup>2</sup> )	( <sup>2</sup> )
All Others	16.71	22.73	.57

**Romania**

TIE			
All Others			

**Singapore**

NMB/Pelmec	4.49		
All Others	4.49		

**Sweden**

SKF	8.27	6.20	
All Others	8.27	6.20	

**Thailand**

NMB/Pelmec	.50		
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Company	BBs	CRBs	SPBs
All Others	.50		
<b>United Kingdom</b>			
Barden Corporation	.84	( <sup>1</sup> )	
Cooper Bearings	( <sup>2</sup> )		
FAG	46.53		
FiatAvio	( <sup>1</sup> )	6.68	
INA	( <sup>1</sup> )		
Pratt & Whitney	( <sup>1</sup> )	5.20	
RHP Bearings	16.21	48.29	
SKF	14.24	( <sup>1</sup> )	
All Others	46.53	48.29	

<sup>1</sup> No U.S. sales during the review period.

<sup>2</sup> No review requested.

**Cash Deposit Requirements**

To calculate the cash deposit rate for each respondent, we divided the total potential uncollected dumping duties (PUDD) for each exporter by the total net USP value for that exporter's sales for each relevant class or kind during the review period under each order.

In order to derive a single deposit rate for each class or kind of merchandise for each respondent (i.e., each exporter or manufacturer included in these reviews), we weight-averaged the purchase price (PP) and exporter's sales price (ESP) deposit rates [using the combined U.S. value of PP sales and ESP sales as the weighting factor]. To accomplish this where we sampled ESP sales, we first calculated a total PUDD for all ESP sales by dividing the sample ESP PUDD by the ratio of sampled weeks to total weeks in the review period. We then calculated a total net USP value for all ESP sales during the review period by dividing the sampled ESP total net value by the ratio of sampled weeks to total weeks in the review period. We then divided the total PUDD by the total USP value to obtain the deposit rate.

We will direct Customs to collect the resulting percentage deposit rate against the entered Customs value of each of the exporter's entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice.

Entries of parts incorporated into finished bearings before sales to an unrelated customer in the United States will receive the exporter's deposit rate for the appropriate class or kind of merchandise.

Furthermore, the following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of antifriction bearings (other than tapered roller bearings) and parts thereof, entered, or withdrawn from warehouse, for consumption on or after



the date of publication, as provided by section 751(a)(1) of the Tariff Act:

(1) The cash deposit rates for the reviewed companies will be as outlined above;

(2) For previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period;

(3) If the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and

(4) The cash deposit rate for all other manufacturers or exporters will be the "all other" rate established in the final results of these administrative reviews. This rate represents the highest rate for any firm with shipments in these administrative reviews, other than those firms receiving a rate based entirely on best information available.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative reviews.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

#### Assessment Rates

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Because sampling and other simplification methods prevent us from doing entry-by-entry assessments, we will calculate wherever possible an exporter/importer-specific assessment rate for each class or kind of anti friction bearings.

##### 1. Purchase Price Sales

With respect to purchase price sales for these final results, we will divide the total PUDD (calculated as the difference between foreign market value and U.S. price) for each importer by the total number of units sold to that importer. We will direct Customs to assess the resulting unit dollar amount against each unit of merchandise in each of that importer's entries under the relevant order during the review period.

Although this will result in assessing different percentage margins for individual entries, the total antidumping duties collected for each importer under each order for the review period will be almost exactly equal to the total PUDD, which is the correct assessment amount.

##### 2. Exporter's Sales Price Sales

For ESP sales (sampled and non-sampled), we will divide the total PUDD for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margin against the entered Customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. While the Department is aware that the entered value of sales during the POR is not necessarily equal to the entered value of entries during the POR, use of entered value of sales as the basis of the assessment rate permits the Department to collect a reasonable approximation of the antidumping duties which would have been determined if the Department had reviewed those sales of merchandise actually entered during the POR.

In the case of companies which did not report entered value of sales, we will calculate a proxy for entered value of sales, based on the price information available and appropriate adjustments (e.g., insurance, freight, U.S. brokerage and handling, U.S. profit, and any other items, as appropriate, on a company-specific basis).

For calculation of the ESP assessment rate, entries for which liquidation was suspended, but which ultimately fell outside the scope of the orders through operation of the "Roller Chain" rule, will be included in the assessment rate denominator to avoid over-collecting. (The "Roller Chain" rule excludes from the scope of an order bearings which were imported by a related party and further-processed, and which comprise less than one percent of the finished product sold to the first unrelated customer in the United States. See the section on "Roller Chain" in this Appendix.)

##### 3. Other Assessment Instructions

In the case of companies which chose to respond to the price list option, we will calculate an *ad valorem* assessment rate for ESP sales by dividing PUDD by a proxy for entered value of sales and for PP sales calculate a specific rate of duty based on units sold. The proxy will be calculated based on the price information available and appropriate adjustments (e.g., insurance, freight, U.S.

brokerage and handling, U.S. profit, and any other items, as appropriate, on a company-specific basis).

When we refer to importers, we are referring to the U.S. customer, whether related or unrelated to the exporter, not the customs broker or brokerage house that might be the importer of record for any of these entries. Our liquidation instructions to Customs will identify the customer that these notices refer to as the importer.

These administrative reviews and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 CFR 353.22 (1990).

Dated: June 11, 1992.

Alan M. Dunn,  
Assistant Secretary for Import  
Administration.

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### Company Abbreviations

ADH—Aerospatiale Division Helicopters  
 Asahi—Asahi Seiko Company  
 Barden—The Barden Corporation  
 Cooper—Cooper Bearings Co., Ltd.; Cooper Roller Bearing Company  
 Dassault—Dassault Industries  
 FAG—Germany—FAG Kugelfischer Georg Schaefer KGaA  
 FAG-Italy—FAG Cuscinetti S.p.A.  
 FAG-UK—FAG (UK) Ltd.  
 Federal-Mogul—Federal-Mogul Corporation  
 Fiat—FiatAvio S.p.A.  
 Fujino—Fujino Ironworks Co., Ltd.  
 GMN—Georg Muller Nurnberg AG; Georg Muller of America  
 Honda—Honda Motor Co., Ltd.; American Honda Motor Co., Inc.;  
 Honda of America Manufacturing, Inc.;  
 Honda Power Equipment Manufacturing, Inc.  
 IJK—Inoue Jikuu Kogyo Co., Ltd.  
 INA—Germany—INA Walzlager Schaeffler KG; INA Bearing Company, Inc.  
 INA-France—INA Roulements S.A.  
 INA-UK—INA Bearing Company, Ltd.  
 Izumoto—Izumoto Seiko Co., Ltd.  
 Koyo—Koyo Seiko Co., Ltd.  
 Maehara—Maehara Ironworks Co., Ltd.  
 MBB—Messerschmitt-Boelkow-Blohm GmbH  
 Meter—Meter S.p.A.  
 Minebea—Minebea Co., Ltd.  
 Nachi—Nachi-Fujikoshi Corp.; Nachi America Inc.  
 Nakai—Nakai Bearing Company, Ltd.  
 Nankai—Nankai Seiko Co., Ltd.  
 NMB/Pelmec Singapore—NMB Singapore Ltd.; Pelme Industries (Pte.) Ltd.  
 NMB/Pelmec Thai—NMB Thai, Ltd.; Pelme Thai, Ltd.  
 NPBS—Nippon Pillow Block Manufacturing Co., Ltd.; Nippon Pillow Block Sales Co., Ltd.  
 NSK—Nippon Seiko K.K.; NSK Corporation  
 NTN—Germany—NTN Kugellagerfabrik (Deutschland) GmbH  
 NTN—Japan—NTN Corporation; NTN Bearing Corporation of America  
 American NTN Bearing Manufacturing Corporation  
 NWG—Neuweg Fertigung GmbH  
 Osaka Pump—Osaka Pump Co., Ltd.  
 Peer Int'l—Peer International, Ltd.  
 P&WC—Pratt & Whitney Canada, Inc.  
 RHP—RHP Bearings; RHP Bearings Inc.  
 Rolls-Royce—Rolls-Royce plc; Rolls-Royce Inc.  
 Showa—Showa Pillow Block Manufacturing Company  
 SKF Group  
 SKF-Germany—SKF GmbH; SKF Gleitlager GmbH; SKF Textilmaschinen-Komponenten GmbH  
 SKF-France—SKF Compagnie d'Applications Mecaniques, S.A. (Clamart); ADR; SARMA  
 SKF-Italy—SKF Industrie; RIV—SKF Officine de Villar Perosa; SKF Cuscinetti Speciali; SKF Cuscinetti; RFT  
 SKF-Sweden—AB SKF; SKF Mekanprodukter AB; SKF Sverige

SKF-UK—SKF (UK) Limited; SKF Industries; AMPEP Inc.

SKF-USA

SNECMA—Societe Nationale d'Etude et de

Construction de Moteurs d'Aviation

SNFA—SNFA Bearings, Ltd.

SNR—SNR Roulements; SNR Bearings USA, Inc.

Takeshita—Takeshita Seiko Company

TIE—Tehnoimportexport

Torrington—The Torrington Company

Tottori—Tottori Yamakai Bearing

Seisakusho, Ltd.

Turbomeca—Turbomeca

Uchiyama—Uchiyama Manufacturing Corporation

Wada Seiko—Wada Seiko Co., Ltd.

Yamaha—Yamaha Motor Co., Ltd.; Yamaha Motor Corporation, U.S.A.

## Scope of the Orders

### A. Description of the Merchandise

The products covered by these orders, antifriction bearings (other than tapered roller bearings), mounted or unmounted, and parts thereof (AFBs), constitute the following classes or kinds of merchandise:

#### 1. Ball Bearings and Parts Thereof

These products include all AFBs which employ balls as the roller element. Imports of these products are classified under the following categories: Antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.

Imports of these products are classified under the following Harmonized Tariff Schedule (HTS) subheadings: 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.10, 8482.99.70, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.99.50.

#### 2. Cylindrical Roller Bearings, Mounted or Unmounted, and Parts Thereof

These products include all AFBs which employ cylindrical rollers as the rolling element. Imports of these products are classified under the following categories: Antifriction rollers, all cylindrical roller bearings (including split cylindrical roller bearings) and parts thereof, housed or mounted cylindrical roller bearing units and parts thereof.

Imports of these products are classified under the following HTS subheadings: 8482.50.00, 8482.80.00, 8482.91.00, 8482.99.70, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.99.50.

#### 3. Spherical Plain Bearings, Mounted or Unmounted, and Parts Thereof

These products include all spherical plain bearings which employ a spherically shaped sliding element, and include spherical plain rod ends.

Imports of these products are classified under the following HTS subheadings: 8483.30.40, 8483.30.80, 8483.90.20, 8483.90.30, 8485.90.00, 8708.99.50.

The HTS item numbers are provided for convenience and Customs purposes. They are not determinative of the products subject to the orders. The written description remains dispositive.

Size or precision grade of a bearing does not influence whether the bearing is covered by the orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of these orders. For unfinished parts, such parts are included if (1) they have been heat treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation.

The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scope of these orders.

### B. Scope Determinations

Since the antidumping duty orders on AFBs went into effect, the Department has issued numerous clarifications of the scope of the orders. The following is a compilation of the scope rulings the Department has made.

Scope rulings made in the Final Determinations of Sales at Less than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 19006, 19019 (May 3, 1989):

#### Products Covered

- Rod end bearings and parts thereof
- AFBs used in aviation applications
- Aerospace engine bearings
- Split cylindrical roller bearings
- Wheel hub units
- Slewing rings and slewing bearings
- Wave generator bearings



- Bearings (including mounted or housed units, and flanged or enhanced bearings) ultimately utilized in textile machinery

#### Products Excluded

- Plain bearings other than spherical plain bearings
- Airframe components unrelated to the reduction of friction
- Linear motion devices
- Split pillow block housings
- Nuts, bolts, and sleeves that are not integral parts of a bearing or attached to a bearing under review
- Thermoplastic bearings
- Stainless steel hollow balls
- Textile machinery components that are substantially advanced in function(s) or value
- Wheel hub units imported as part of front and rear axle assemblies; wheel hub units that include tapered roller bearings; and clutch release bearings that are already assembled as parts of transmissions

Scope rulings completed between April 1, 1990 and June 30, 1990. See Scope Rulings, 55 FR 42750 (October 23, 1990):

#### Products Excluded

- Antifriction bearings, including integral shaft ball bearings, used in textile machinery and imported with attachments and augmentations sufficient to advance their function beyond load-bearing/friction-reducing capability

Scope rulings completed between July 1, 1990 and September 30, 1990. See Scope Rulings, 55 FR 43020 (October 25, 1990):

#### Products Covered

- Rod ends
- Clutch release bearings
- Ball bearings used in the manufacture of helicopters
- Ball bearings used in the manufacture of disk drives

Scope rulings completed between April 1, 1991 and June 30, 1991. See Notice of Scope Rulings, 56 FR 36774 (August 1, 1991):

#### Products Excluded

- Textile machinery components including false twist spindles, belt guide rollers, separator rollers, damping units, rotor units, and tension pulleys

Scope rulings published in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof: Final Results of Antidumping Administrative Review*, 56 FR 31696, 31698 (July 11, 1991):

#### Products Covered

- Load rollers and thrust rollers, also called mast guide bearings
- Conveyor system trolley wheels and chain wheels

Scope rulings completed between July 1, 1991 and September 30, 1991. See Scope Rulings, 56 FR 57320 (November 8, 1991):

#### Products Covered

- Snap rings and wire races
- Bearings imported as spare parts
- Custom-made specialty bearings

#### Products Excluded

- Certain rotor assembly textile machinery components
  - Linear motion bearings
- Scope rulings completed between October 1, 1991 and December 31, 1991. See Notice of Scope Rulings, 57 FR 4597 (February 6, 1992):

#### Products Covered

- Chain sheaves (forklift truck mast components)
- Loose boss rollers used in textile drafting machinery, also called top rollers
- Certain engine main shaft pilot bearings and engine crank shaft bearings

Scope rulings completed between January 1, 1992 and March 31, 1992. See Scope Rulings, 57 FR 19602 (May 7, 1992):

#### Products Covered

- Ceramic bearings
- Roller turn rollers
- Clutch release systems that contain rolling elements

#### Products Excluded

- Clutch release systems that do not contain rolling elements
- Chrome steel balls for use as check valves in hydraulic valve systems

Scope rulings completed since April 1, 1992:

#### Products Excluded

- Finished, semiground stainless steel balls

#### 1. Families and Model Match

*Comment 1:* Torrington asserts that the Department's determination of the parameters of such or similar merchandise under section 771(16) of the Tariff Act is impermissibly narrow. Specifically, Torrington maintains that the limitation of such or similar merchandise to bearings that belong to the same bearing family is improper because of the Department's requirement that bearings must share certain physical characteristics (e.g.,

precision grades) to be considered members of the same family.

Torrington notes that the statute prefers sales over constructed value (CV) as the basis for foreign market value (FMV) and argues that the Department did not accord this preference sufficient weight because it immediately resorted to constructed value for observations for which no model or family match could be made. Torrington cites section 771(16)(C) in support of its contention that a product that is not a member of the same bearing family as the subject merchandise should still be considered similar, and therefore used as the basis of comparison before resorting to constructed value, if it is within the same general class or kind, like the subject merchandise in the purposes for which used, and may reasonably be compared to the subject merchandise.

Torrington argues that the Department has construed the phrase such or similar broadly in past investigations and administrative reviews to allow comparison of articles with substantially different physical dimensions. Torrington cites *Tapered Roller Bearings from Japan; Final Determination of Sales at Less Than Fair Value*, 52 FR 30700, 30702 (1987), *aff'd.*, *NTN Bearing Corp. of America v. United States*, 14 CIT \_\_\_\_\_, 747 F. Supp. 726, 735-737 (1990), as particularly relevant to the current Antifriction Bearing reviews. Torrington recommends that the Department use the sum of the deviations methodology that was employed in the Tapered Roller Bearing (TRB) reviews, whereby different sized bearings could be considered similar and therefore used to make price-to-price comparisons, to determine the most similar merchandise in the current AFB reviews. Torrington suggests that this approach is in accordance with the catalogs of certain respondents, wherein bearings of slightly different physical dimensions are grouped together. Torrington further contends that it is not tardy in voicing its objections to the Department's limitation of such or similar merchandise and that it has repeatedly raised the issue throughout the current reviews. Torrington asserts that it voiced its objections to the Department's family approach during the first reviews. Also concerning the first reviews, Torrington argues that because the family approach was used in the first reviews, respondents have had time to structure their prices to take advantage of this approach and undermine the purpose of the antidumping duty orders.



Finally, Torrington provides statistics on the percentage of observations in the preliminary margin program where home market (HM) sales were not used as the basis for comparison for certain respondents and claims that this percentage was as high as 47 percent for certain respondents. Torrington also references a previous submission to the Department focusing on the percentage of potentially unmatched sales values for certain companies. Torrington maintains that these percentages would be lower if the Department had used a model match methodology that employed a more liberal standard in determining whether models were similar for the purposes of the statute.

Koyo agrees that there is a statutory preference for price-to-price as opposed to price-to-CV comparisons but states that the statute vests the Department with the authority to determine whether the home market merchandise and subject merchandise may reasonably be compared. Koyo thus contends that the statutory preference for price-to-price comparisons does not mean that all possible sales comparisons are preferred to the use of constructed value as a matter of law. Koyo maintains that the Department's model match methodology for the current AFB reviews, in particular the family concept on which the methodology is based, is a reasonable exercise of its discretion because it considers the commercial realities of the AFB market, in particular the extensive variety of models in the market and the fact that families of similar bearings do exist.

NSK also emphasizes the discretion allowed to the Department to determine what constitutes similar merchandise. NSK argues that the Department's definition of family is sufficiently broad by noting that although all bearings classified in the same family share certain characteristics (e.g., precision grade), they do not have to be identical across the board to be within the same family, and may have differences such as raw materials composition and the presence of shields and seals. INA contends that a change in the model match methodology at this stage in the proceeding would require additional information from respondents and would further complicate the already extremely complicated analysis that the Department must perform in calculating margins in the current reviews.

In response to Torrington's statement that the Department should use the TRB model match methodology, Koyo and SKF note that the TRB reviews involve far fewer models than the AFB reviews and suggest that the TRB models differ

from AFB models in certain fundamental physical characteristics and in the manner in which those characteristics vary from one model to another. SKF further states that a different model match approach for AFBs is justified because the technical criteria examined by the Department for tapered roller bearings (e.g., the "Y factor") are not the same as those for AFBs. NSK and SKF argue that Torrington's identification of products that would allegedly qualify as similar using the Department's TRB methodology but not the AFB methodology fails to consider that a 20 percent difmer cap was used for TRBs but was not used in the preliminary margin calculations for AFBs. SKF further notes that Torrington did not employ a below cost of production (COP) test in its identification of observations where the Department resorted to constructed value in the model match and states its catalog does not provide support for the TRB approach suggested by Torrington.

Several respondents contend that the model match issue is well settled and that all parties have already had sufficient opportunity to air their views on this issue. Koyo states that the issues regarding the model match methodology have been ventilated on several previous occasions and that the Department has refused to accept the methodology proposed by Torrington; accordingly, the Department should not change its methodology absent compelling circumstances. FAG and SKF argue that Torrington explicitly assented to the Department's family matching methodology during the Department's solicitation of pre-review comments prior to the first reviews. FAG further notes that Torrington argued against broadening the definition of family during the first reviews and did not raise the issue in its General Issues Case Brief to the first reviews.

Concerning the statistics cited by Torrington on the frequency of the Department's resort to constructed value, Koyo asserts that Torrington's complaint that the Department should have found a greater percentage of matching sales does not address the issue of whether the methodology is in accordance with law. NSK contends that there is a significant discrepancy between Torrington's projections of unmatched transactions and the Department's actual calculations for the preliminary results. FAG-Germany argues that the statistics used by Torrington concerning the effectiveness of the model match are misleading to the extent that they focus on the percentage of unmatched sales value and not on the

percentage of unmatched observations, which is significantly lower for FAG-Germany. FAG-Italy also criticizes Torrington's statistical analysis concerning the percentage of unmatched observations in the preliminary margin calculations.

*Department's Position:* The family approach used in the current reviews is an appropriate method of determining such or similar merchandise. The issue of whether the Department's definition of such or similar merchandise is impermissibly narrow is only relevant to observations where there were no sales of identical or family bearings to match and the Department resorted to constructed value as a result. This resort to constructed value as a means of comparison is entirely appropriate under certain conditions. In fact, the Department's use of constructed value as the FMV when the home market merchandise to be used for comparison was sold below the cost of production or when identical or similar merchandise is not available for comparison is a predictable and statutorily mandated result. See sections 773(a)(2) and 773(b) of the Tariff Act.

The statute provides the Department with the discretion to determine whether an appropriate home market FMV exists for purposes of comparison to U.S. price (USP) and, if not, when to resort to constructed value as an alternate source of comparison. The Department has the authority to determine what merchandise qualifies as such or similar for the purposes of the statute. *United Engineering & Forging v. United States*, 779 F. Supp. 1375, 1380-82 (CIT 1991); *NTN Bearing Corp. v. United States*, 747 F. Supp. 726, 735-36 (CIT 1990); *Kerr-McGee Chem. Corp. v. United States*, 741 F. Supp. 947, 951-52 (CIT 1990); *Monsanto Co. v. United States*, 698 F. Supp. 275, 277-278 (CIT 1988); *Timken Co. v. United States* (Timken I), 630 F. Supp. 1327, 1338 (CIT 1986). Moreover, it is the administering agency rather than an interested party that should make the determination as to what methodology should be used. *NTN Bearing*, 747 F. Supp. at 736; *Timken I*, 630 F. Supp. at 1338. If the Department determines that such or similar merchandise sold or offered for sale in the home market does not exist for purposes of comparison with a particular USP, the Department may use the constructed value of the merchandise in question as the foreign market value. Section 773(a)(2). In fact, the Tariff Act does not allow the use of a price based FMV for comparison to USP if the Department does not determine that it may reasonably be



compared with the merchandise in question. Section 771(16)(C)(iii).

In the context of the current AFB reviews, the family model match approach constitutes an appropriate use of this discretion. We initially note that bearings do not have to be identical to be members of the same bearing family. The preliminary results demonstrate that bearings within the same family may have significant differences in variable cost of manufacturing. Torrington has previously acknowledged that bearings belonging to the same family may have differences in cost of manufacturing by specifically requesting a difference in merchandise adjustment when family comparisons are made. See Torrington letter to the Department, July 17, 1991, A-100-001, at 23-26 (referencing July 23, 1990 letter to the Department).

The family approach used in the current reviews was specifically designed to take into account the salient characteristics of the AFB market, particularly the large number of individual bearing models that are offered for sale and the fact that many models may be traced to a core family because they share the following characteristics: load direction, bearing design, number of rows of rolling elements, precision rating, dynamic load rating, outside diameter, inside diameter, and width/height. When this methodology was developed, all parties, including Torrington, agreed that it was reasonable not to conduct any ranging of the criteria that would allow bearings with differences in these characteristics to be considered members of the same family. The concern was that ranging the criteria would force comparisons of models with greatly varying costs. Department of Commerce Decision Memorandum, July 30, 1990, at 5. This concern remains valid. Given the fact that the AFB market is comprised of literally thousands of different bearing models, it is appropriate for the Department to require that bearings share these characteristics in order to effect its statutory mandate of determining when a reasonable comparison can be made.

Thus, the Department has properly exercised its discretion in the context of the current AFB reviews by using a family approach to determine such or similar merchandise. In addition, the model match methodology that employs this approach has been conducted in accordance with the requirements of the Tariff Act. Pursuant to section 773, the Department first attempted to match U.S. sales with identical merchandise in the home market. If no identical

merchandise was sold, the Department attempted to match the merchandise to similar merchandise offered for sale in the home market, *i.e.*, the bearing family. The Department resorted to constructed value only when there were no sales of identical or family bearing models to match to the merchandise sold in the U.S.

The history of the AFB proceedings to date demonstrates that all parties, including Torrington, have had numerous occasions to air their views on this issue. The Department solicited comments from interested parties in devising the family approach for the first AFB reviews, during which time Torrington stated that this proposition was basically unobjectionable. The specific characteristics of the AFB market—thousands of models sold, many of which are grouped around the same family—are the same for the current reviews as they were when Torrington voiced its approval of the family approach. The parties have had several other opportunities to comment on this issue and the Department has carefully weighed the considerations involved in determining that the family approach represents a reasonable model match methodology with respect to the AFB market. Although the Department will continue to consider the appropriateness of its matching criteria, it will only alter the criteria when compelling reasons exist. See Final Determination of Sales at Less Than Fair Value: Certain Residential Door Locks and Parts Thereof from Taiwan, 54 FR 53153, 53157 (Dec. 27, 1989).

The Department has adopted this position in the interest of maintaining a stable and predictable approach to its antidumping duty margin calculations. Torrington has not provided substantive evidence to support its assertion that the fact that the family approach was used in the first reviews will allow respondents to restructure their prices to take advantage of its use in subsequent reviews. In fact, since the results of the first reviews were not available until June 1991, respondents could not have taken these results into account in their pricing practices for the current review, which covered the period May 1990—April 1991.

The statistics cited by Torrington concerning the percentage of observations where home market sales were not used as the FMV in the preliminary margin program do not address the issue of whether the family approach is appropriate because they do not demonstrate that the Department's resort to CV was unreasonable when no family match was found. Torrington's

references to its past submissions to the Department projecting the percentage of sales value where home market sales are not used as the FMV are unpersuasive for the same reason. Further, these statistics ignore the fact that the Department may refuse to use home market sales as a basis for comparison for reasons other than the lack of a family match; for instance, home market sales are also disqualified if they fail the cost test.

**Comment 2:** Respondents NSK, FAG, Koyo, and GMN claim that the Department improperly failed to apply a 20 percent difference in merchandise (difmer) cap in making sales comparisons. Application of the difmer cap would limit the use of similar merchandise in making sales comparisons to those comparisons where the difmer adjustment is less than or equal to 20 percent of the variable cost of manufacturing the U.S. merchandise.

The aforementioned respondents assert that disregard of the difmer cap contravenes the antidumping statute, Department regulations and established Departmental practice. Referring to the statutory definition of similar merchandise in section 771(16)(B)(iii) of the Tariff Act, Koyo and NSK argue that the difmer cap is essentially a test to determine whether home market models are "approximately equal in commercial value to the subject merchandise." Koyo states that the Department's failure to apply the difmer cap or, alternatively, to perform any test to determine whether compared models are approximately equal in commercial value, is a clear violation of the express requirements of the U.S. antidumping law.

FAG and GMN contend that the practice of applying a difmer cap stems from 19 CFR 353.57(a), which provides for "a reasonable allowance for differences in the physical characteristics of merchandise compared." FAG states that the Department has consistently interpreted such reasonable allowances to be difmers which are 20 percent or less than U.S. costs of manufacture. FAG and GMN also claim that they had relied upon the Department's use of the difmer cap and, therefore, have been unduly prejudiced by this abrupt and unexpected change in Departmental practice.

Both Torrington and Federal-Mogul contend that no statutory nor regulatory authority mandates application of the difmer cap. Both parties argue that the family model-match methodology employed by the Department obviates any need to apply such a cap. Federal-



Mogul argues that the Department's analysis takes into account the degree of the difmer adjustment by ranking available matches according to the lowest cost deviation. Regarding respondents' argument of reliance on past Departmental practice, Federal-Mogul notes that no respondent can hold reasonable expectations of cross-case prospective application of a guideline.

**Department's Position:** We agree with respondents that the 20 percent difmer cap guideline warrants application in these reviews. We applied the subject guideline to ensure that a reasonable comparison, as required by section 771(16)(C)(iii) of the Tariff Act, is made between the product sold in the home (or third country) market and the product sold in the U.S. In addition, the difmer cap minimizes the effect of certain distortions created in calculations caused by making a difmer adjustment with a variable cost difference of 20 percent or more. Final Determination of Sales At Less Than Fair Value; Certain Small Business Telephone Systems and Subassemblies Thereof From Korea, 54 FR 53145 (December 27, 1989).

We disagree with Torrington's and Federal-Mogul's argument that the family model match methodology obviates the need for a difmer cap. Both the family scheme and the difmer cap constitute complementary bases for ensuring reasonable comparisons of merchandise. The Department has applied a difmer cap in many cases where comparisons were made to a single similar product. Due to the diverse nature of the AFB market, the Department devised, as a simplification measure, a system which enabled us to avoid complicated model match analysis for selecting a single most similar home market model for comparison to each U.S. model. Instead, the Department requested that respondents group models by eight specified characteristics into families which would be used as a basis to make reasonable comparisons. See Comment 1 above. As in other cases, where comparisons are made to a single product, identifying the appropriate family of products is only the first step in determining reasonable comparisons. The difmer cap constitutes a separate step which ensures that reasonable comparisons of family models can be made.

The Department recognizes that the subject guideline may not be applicable in all reviews, as demonstrated in Certain Stainless Steel Cooking Ware from the Republic of Korea; Final Results of Antidumping Duty

Administrative Review (Cooking Ware), 56 FR 38115 (August 12, 1991). In Cooking Ware, the Department verified that there were clearly identifiable and easily quantifiable material cost differences between otherwise identical or nearly identical products. Therefore, such products were reasonably comparable despite a difmer adjustment above 20 percent. Such circumstances which warrant disregard of the difmer cap do not exist here.

Contrary to Federal-Mogul's assertion that our analysis for the preliminary results took into account the degree of differences in merchandise, the Department used the weighted-average variable cost of manufacturing (VCOM) of the corresponding bearing family in the calculation of difmer adjustments. Therefore, a ranking of family bearings by the amount of the corresponding difmer adjustment would be meaningless. The Department calculated such adjustments as the difference between the VCOM of the bearing sold in the U.S. and the weighted-average VCOM of the corresponding bearing family.

For purposes of calculating the final results, the Department used CV as the basis for FMV if the difmer adjustment exceeded 20 percent of the VCOM of the U.S. product. However, for those U.S. sales where no comparable CV data was available and where the respondent had not been requested to provide such CV data, the Department applied the weighted-average rate of the analyzed sales to determine dumping margins.

**Comment 3:** Koyo and GMN contend that a respondent's U.S. sales of merchandise made by one manufacturer may not be compared to that respondent's foreign market sales of merchandise made by a different manufacturer. These respondents cite section 771(16)(B)(i) of the Tariff Act, which states, in part, that such or similar merchandise is merchandise produced in the same country by the same person.

**Department's Position:** In accordance with the definition of such or similar merchandise in section 771(16)(B)(i), we have not considered merchandise known to have been produced in the facilities of one manufacturer to be such or similar to the merchandise produced in the facilities of another manufacturer, even if the merchandise is physically identical or physically similar and is sold by the same person. Accordingly, we have not made comparisons in these final results between sales of merchandise produced by different manufacturers.

**Comment 4:** Torrington argues that the Department should reject FAG-

Germany's response and use best information available (BIA) because of FAG's failure to identify manufacturers of purchased bearings. At verification, the Department confirmed that this information could be traced through FAG's records. This information is needed to confirm that no middleman dumping occurred.

FAG contends that Torrington mischaracterized the Department's verification report, which referred only to FAG's source code as the source of manufacturer identity information. That source code merely records bearings as purchased German bearings and does not distinguish between individual manufacturers. Thus, it was not possible for FAG under its existing record-keeping system to determine the actual manufacturer of each purchased German bearing.

**Department's Position:** We have determined for these final results that sales of merchandise produced by one manufacturer cannot be compared to sales of merchandise produced by another manufacturer. See Comment 3 above. We verified that FAG cannot readily determine the actual manufacturer of merchandise purchased from unrelated suppliers in Germany. Since FAG did identify merchandise produced by FAG or its affiliate Elges, and since FAG/Elges merchandise accounts for most of FAG's sales, the response is reasonably complete and accurate. Therefore, we have accepted the manufacturer information as reported.

## 2. Sampling

**Comment 1:** Nachi claims that the Department's use of sampling techniques produces an unrepresentatively small sample (for certain models) upon which to calculate foreign market value. Nachi's claim is based on an opinion letter to Nachi from a consulting group. Nachi contends that a foreign market value based upon a sample of one transaction cannot be either reliable or representative. Torrington argues that Nachi has failed to provide evidence supporting its argument that the Department's use of sampling does not produce representative results. Torrington points out that the opinion letter submitted by Nachi contains no concrete examples to support its theory, but only refers to hypothetical examples. Torrington argues that the fact that there are occasions where the value sampled is based on a small number of sales would be expected, and the idea of disregarding certain transactions means that the sample would no longer be random. Torrington



cites Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Colombia, 56 FR 32169, 32171 (July 15, 1991), where the Department did not disregard sampled sales with aberrantly low prices due to the perishability of goods, as that would bias the sample in violation of section 777A(b) of the Tariff Act. In response to this and to other sampling and averaging comments by Nachi, Federal-Mogul argues that Nachi is trying to "cherry pick" the home market sales in order to determine what it considers representative. Federal-Mogul argues that 19 CFR 353.59(b)(2) indicates that the "Secretary will select the appropriate representative samples" [emphasis added], and not the respondents. Once the Department has determined that sampling or averaging techniques are warranted, Federal-Mogul argues that the results of those techniques must be accepted; otherwise the sampling itself is meaningless.

**Department's Position:** Nachi has provided no evidence of record to indicate that the Department's sampling techniques produce an unrepresentative result. Nachi's opinion letter is lacking in concrete examples. It is expected that, even though a sample is representative, there could be certain instances where the models in a sample represent only a few transactions. This could, of course, reflect that there may only be a limited number of transactions of a particular model. However, Nachi provides no specific evidence indicating that this is the case, or that the sample is unreliable. See Final Determination of Sales at Less Than Fair Value; Fresh Kiwi Fruit from New Zealand, 57 FR 13702 (April 17, 1992), where it was determined that trying to remove members of a random sample might skew the results, rendering them less reliable, and where the respondent also failed (as in the instant case) to show that the selection methodology was inappropriate or produced unrepresentative results.

### 3. Annual Averaging

**Comment 1:** NPBS and Koyo argue that section 777A of the Tariff Act authorizes the Department to use averaging techniques to establish FMV only when such averaging techniques result in margin calculations which are representative.

NPBS asserts that the Department's determination that the annual weighted-average FMV is as representative as the monthly weighted-average FMV is incorrect. NPBS holds that the 10 percent variance that the Department accepts between the annual weighted-averaged and monthly weighted-average

FMVs can have a distortional effect on the margin calculation, because it can increase the margin by as much as 10 percent, producing dumping findings where no dumping has occurred.

**Department's Position:** Section 777A of the Tariff Act requires the Department to ensure that samples and averages shall be representative of the transactions under review. Therefore, before adopting the use of an annual weighted-average FMV, we conducted two studies on prices to ensure that the transactions, and thus the results produced, would be representative. First, we compared the monthly weighted-average price to the annual weighted-average price. We found that the annual weighted-average price for more than 90 percent of the products sold was within 10 percent of the monthly weighted-average price. Second, we tested whether home market prices of the subject merchandise consistently rose or fell during the period of review (POR). We found that no significant correlation existed between price and time. That is, prices did not consistently rise or fall so as to make annual weighted-average prices unrepresentative of home market prices. Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 57 FR 4975 (February 11, 1992).

All averaging techniques, whether they are monthly or annual, result in variances between the actual price and the average price. The fact that over 90 percent of the annual weighted-average prices fall within 10 percent of the monthly weighted-average prices demonstrates that the variances produced by using an annual weighted-average FMV do not differ significantly from the variances produced by using a monthly weighted-average FMV. Furthermore, NPBS does not offer any evidence that an annual weighted-average FMV results in a systematic bias that would create higher dumping margins than would result from using a monthly weighted-average FMV. Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 57 FR 4975 (February 11, 1992).

**Comment 2:** Nachi argues that, because section 777A(a)(1) only allows annual averaging when the volume of transactions is significant, if a certain model does not have more than a few transactions, annual averaging cannot be used for that model. Nachi further

refers to the same section of the statute in arguing that the averages must be representative of the transactions. Nachi claims that it is impossible for an annual average based on one or a few transactions to be representative.

Nachi contends that the Department's annual average test may prove to be misleading when applied to infrequent sales. Nachi argues that, if a foreign market value were based only on one sale, it would naturally find no correlation between price and time, and the monthly weighted-average price would be the same as the annual weighted-average price (so it would fall within the 10 percent range). Nachi proposes that the Department employ a test to determine that the sample population is sufficiently large to justify the use of annual weighted-averages for foreign market value.

Torrington points out that Nachi has provided no examples of models sold infrequently during the period of review, and has failed to demonstrate why the careful testing of the Department would still not yield representative results in such a case. Torrington contends that Nachi has not indicated the proportion of alleged infrequent sales to more frequent sales. Torrington cites *Floral Trade Council of Davis, California v. United States*, 704 F. Supp. 233 (CIT 1988), where the court "stressed that the party challenging the Department's methodology must demonstrate by citation to evidence of record" (Id. at 233) that the Department's methodology obscured or amplified dumping. Torrington claims that Nachi has failed to provide proof based on the evidence of record.

**Department's Position:** The Department decides on a case and a company-specific basis to use averaging or sampling, if a significant volume of sales is involved, as authorized under section 777A of the Tariff Act. Due to the large number of sales involved in this review, we determined that the use of annual weighted-average FMVs in calculating margins would dramatically simplify our analysis. In deciding whether or not to calculate an annual weighted-average FMV for a particular company, we examined the company's pricing patterns for the general class or kind of merchandise. We performed tests on the class or kind of merchandise to determine that there was no significant correlation between price and time and that there was a minimal variance between the monthly and annual weighted-average prices. Our price-stability guidelines are fulfilled for sales of the class or kind in general. Therefore, we believe that stable pricing



patterns generally exist for sales of individual models. Those variations that do exist are offset by the fact that the weighted-average margin is assessed for the entire class or kind of bearing. Finally, we note that Nachi has failed to demonstrate, using evidence on the record, that the annual average methodology as applied by the Department to infrequent sales produces anything other than representative results.

*Comment 3:* Nachi and NPBS contend that the Department's use of an annual weighted-average FMV violates the statutory provision that sales used in price comparisons must be contemporaneous.

Nachi claims that the Department may only use averaging within the context of the 90/60 day rule. Nachi cites the first AFB review (Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 56 FR 31692 (July 11, 1991)), where weighted-average foreign market values were calculated for home market sales contemporaneous to U.S. sales. Nachi refers to the statutory authority that the Department has for sampling and averaging and claims that the use of averaging techniques must not violate other statutory requirements. Nachi argues that, just as the Department may not justify averaging other than such or similar merchandise into its annual average foreign market values, the Department cannot average in anything other than contemporaneous sales. Nachi further argues that the Department's annual average program does not test for contemporaneity. Nachi contends that, as rules of contemporaneity and statutory authority for annual averaging might conflict, the Department must determine that at least one sale within the average foreign market value is contemporaneous to each U.S. sale to be analyzed.

Torrington argues that Nachi has not provided specific examples from the preliminary margin calculations which demonstrate that the Department's annual averaging technique is contrary to the contemporaneity requirement under the statute and regulations. Torrington contends that the Department fulfilled the contemporaneity requirement by confirming that prices were not correlated with time. Torrington cites Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 57 FR 4978 (February 11,

1992), where the Department determined that, since prices were not correlated with time, there was no contemporaneity issue. Torrington also argues that Nachi's various citations (Final Results of Antidumping Duty Administrative Review; Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand, 56 FR 58355, 58359 (November 19, 1991); Final Results of Antidumping Duty Administrative Review; Certain Small Business Telephone Systems and Subassemblies Thereof From Korea, 57 FR 8298, 8300 (March 9, 1992)) to demonstrate that the 90/60 day guideline is standard Department practice are inapplicable, as they are not concerned with sampling technique. Torrington refers to Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 56 FR 31748 (July 11, 1991), where the Department stated that the 90/60 day guideline was only applied because the transactions were not sampled.

*Department's Position:* Before deciding whether or not to calculate an annual weighted-average FMV, we measured the correlation between price and time. In addition, we compared the monthly weighted-average price to the annual weighted-average price to determine if the variance in price was significant. For the companies that were annually averaged, there was consistency within the entire universe of sales, as the variance was within 10 percent, and prices did not consistently rise or fall over time so as to make annual weighted-average prices unrepresentative of home market prices. Since we have confirmed that price variations are not correlated with time, there is no contemporaneity issue. Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 57 FR 4975 (February 11, 1992).

*Comment 4:* NPBS and Koyo argue that, if the Department insists on using an annual weighted-average FMV, it should employ an annual weighted-average U.S. price as well, in order to achieve an "apples-to-apples" comparison. NPBS notes the Department's decision to use weighted-average U.S. prices in Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico, 55 FR 12679 (April 5, 1990).

*Department's Position:* We disagree with NPBS and Koyo's assertion that we must average U.S. price on the same

basis as FMV to ensure an "apples-to-apples" comparison. It would be unacceptable to average U.S. price because it would allow a foreign producer to mask dumping margins by offsetting dumped prices with prices above FMV. That is, a foreign producer could sell half its merchandise in the United States at less than FMV, and the other half at more than FMV, and arrive at a zero dumping margin. The Department does not encourage selective dumping, nor do we reward a party for not dumping selected sales. Except in instances where the Department has conducted reviews of seasonal merchandise which has very significant price fluctuations due to perishability (Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Colombia, 55 FR 20495 (May 17, 1990)), the idea of averaging U.S. price has been rejected (Final Results of Antidumping Duty Administrative Review; Pressure Sensitive Plastic Tape from Italy, 54 FR 13091 (March 30, 1989)). Since the merchandise under review is not a perishable product, and our tests of home market sales revealed that there are no significant price fluctuations, there is no reason to believe that averaging of U.S. prices is needed to account for very significant price fluctuations. Final Results of Antidumping Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan, 57 FR 4975 (February 11, 1992).

*Comment 5:* INA suggests that annual weighted-average FMVs should be used in the review for all respondents. INA maintains that, in applying the methodology selectively to respondents, the Department has not followed appropriate rule-making procedures according to the Administrative Procedures Act (APA) (5 U.S.C. §§ 551(4) and 553). INA asserts that the rule by which the Department has determined whether annual weighted-average prices are representative is a substantive rule subject to the rulemaking procedures of the APA. INA argues that the APA's rulemaking procedures prevent the Department from applying monthly weighted-average FMVs to some respondents, but not to others.

GMN and Federal-Mogul disagree, arguing that the use of annual averages for all respondents is not justified, since some respondents have unstable home market prices according to the Department's price-stability guidelines.

Torrington maintains that the Department's rule for determining the



representativeness of annual weighted-average prices is not substantive, but derives from the Department's interpretation of the averaging-sampling provisions in section 777A. Torrington cites *Timken Company v. United States*, (11 CIT 786, 805-806, 673 F. Supp. 495, 513-514 (1987)) in which it claims that the CIT determined that agency interpretative rules are neither binding nor subject to the procedural requirements of the APA.

**Department's Position:** The Department uses annual weighted-average FMVs only when a firm's pricing practices are stable over time, according to established price-stability guidelines. See Comment 1 above. To apply annual averaging methodology to all respondents, as INA suggests, would be improper, since some respondents fail to exhibit sufficient price stability to warrant reliance on annual averages. Section 777A of the Tariff Act requires that the Department ensure that averages are representative of the transactions under review. Our test simply ensures that annual weighted averages fulfill the requirement of representativeness.

We do not agree with INA's assertion that the Department's test 10-90 for the representativeness of annual averages is subject to the rule-making procedures of the APA. The adoption of this methodology is not rule-making within the meaning of the APA. We note that the APA requires notice and comment procedures in connection with agency rule-making, but makes an exception for interpretative rules. 5 U.S.C. § 553 (1982). In *Timken v. United States*, the CIT addressed the distinction between substantive and interpretative rules, noting that interpretative rules are "statements as to what the administrative officer thinks the statute or regulation means." The CIT noted further that interpretative rules serve to clarify or explain existing law, rather than to create new law, rights, or duties. Our representativeness test is similar to the 10-90 percent rule for determining whether sales below cost will be disregarded in the calculation of FMV, which the CIT, in *Timken v. United States*, determined is a result of the agency's interpretation of the section 773(b)(1). In this respect then, the representativeness test is interpretative and not subject to the notice and comment requirements of the APA.

**Comment 6:** NPBS argues that the Department is limited to using an annual weighted-average FMV that differs from a monthly weighted-average FMV by a factor of plus or minus one percent. NPBS refers to 19 CFR 353.59(a) which

states that the Department can ignore certain adjustments only if "individual adjustments hav[e] an *ad valorem* affect of less than 0.33 percent, or, if any group of adjustments has an *ad valorem* effect of less than 1.0 percent of the FMV."

**Department's Position:** We disagree with NPBS' assertion that 19 CFR 353.59(a) limits the Department to using an annual weighted-average FMV that differs from a monthly weighted-average FMV by a factor of plus or minus one percent. We note that section 19 CFR 353.59(a) applies only to adjustments to FMV. Sections 353.59 (b) and (c) give the Department the authority to use averages and samples which are representative of the transactions under review. The Department determines that annual averages are representative of monthly weighted averages according to the criteria specified above. See Comment 1 above.

**Comment 7:** NPBS argues that the Department, in announcing its decision to use the annual average methodology after the review period ended, has prevented the respondents from taking adequate preemptive pricing measures.

**Department's Position:** Section 777A (a)(1) and (b) of the Tariff Act give the Department the discretion to average and sample "whenever a significant volume of sales is involved or a significant number of adjustments to price is required." The statute mandates only that the "samples and averages be representative of the transactions under investigation." There is no requirement that the Department announce in advance that it will employ averaging methodology in its analysis.

#### 4. Transfer Pricing

Torrington alleges that various respondents are reporting transfer prices that are below the cost of production plus profit. Torrington maintains that below cost transfer pricing between the parent company and subsidiary is resulting in: (1) reimbursement of antidumping duties; (2) indirect financing of expenses associated with antidumping duty deposits; and (3) U.S. Customs valuation problems. The Department will address each of these issues in turn.

**Comment 1:** Torrington maintains that the Department should conclude that antidumping duty reimbursement has taken place in instances where (1) the average transfer price is less than the cost of production plus profit calculated on a weighted-average basis and (2) the Department has preliminarily determined that antidumping margins exist. Torrington contends that, in accordance with 19 CFR 353.26(a), the Department should adjust USP

downward to account for the potential reimbursement of antidumping duties that allegedly occurs between the parent and subsidiary through the manipulation of transfer prices.

Torrington argues that transfer prices are acceptable for purposes of transaction value if the relationship between the parties did not influence the prices between them. In Torrington's view, transfer price should approximate the adjusted USP or the COP plus profit under an arms-length transfer pricing regime; however, Torrington argues that its calculations suggest the contrary.

To support its contention that transfer price manipulation is tantamount to antidumping duty reimbursement, Torrington devised an analysis that compared the relationships between transfer price and adjusted USP and transfer price and cost of production plus profit. In this analysis, the USP was adjusted by factoring out the country-specific consumption or value added tax and then backing out a profit margin of 6 percent to arrive at an adjusted USP while the computed value of the merchandise was ascertained by adding COP plus profit. Torrington established in both of its tests that transfer prices fell below the benchmark for a number of firms.

Torrington maintains that the Department should therefore assume that related parties have internationally transferred funds for purposes that probably include the minimization of tariffs and taxes. In instances where potential antidumping duty reimbursement has occurred between the parent and subsidiary via the manipulation of transfer prices and where preliminary dumping margins have been found, Torrington urges the Department to accordingly deduct these expenses from USP pursuant to 19 CFR 353.26(a).

Respondents respond to the allegation that they are manipulating transfer prices to reimburse their U.S. subsidiaries for antidumping duties with several different arguments.

First, many respondents assert that reimbursement is not taking place. The SKF Group, GMN, NSK and Nachi state that their U.S. subsidiaries have not been reimbursed and will not be reimbursed for any dumping duties owed through the manipulation of transfer prices or otherwise. Indeed, NSK accuses Torrington of making unsupported allegations of U.S. Customs fraud, and contends that Torrington's arguments are speculative at best.

Furthermore, Koyo and FAG argue that the calculations performed by Torrington to support its arguments are



unreliable. FAG-Germany, FAG-Italy, and FAG-UK state that they attempted to reproduce Torrington's calculations in several different ways, but that each time they arrived at widely divergent results. They assert that there are innumerable variables involved in Torrington's calculation, any one of which can seriously affect the ultimate figure. Thus, FAG-Germany, FAG-Italy, and FAG-UK argue that Torrington's methodology for deriving the ratio of transfer price to cost of production is not adequately explained.

In addition, several respondents observe that the test suggested by Torrington does not appear anywhere in the antidumping law. According to INA and Koyo, the statute does not provide for a test to determine whether or not export transfer prices between related parties are at less than cost of production plus profit. The SKF Group and FAG assert that a transfer of goods between a foreign producer and its U.S. affiliate is not an Exporter's Sales Price (ESP) transaction, and therefore not subject to the statute's provisions concerning reimbursement and not relevant to the calculation of USP, which is based on the sales price to the first unrelated U.S. customer. NMB/Pelmelec further argues that the introduction of an arms-length standard for goods and services transferred between related parties would add enormous uncertainty and complexity to the administration of the antidumping law. However, NMB/Pelmelec states, if the Department decides to make a downward adjustment to USP for the amount by which the cost of production plus arms-length profit exceeds the transfer price, then at the very least a corresponding downward adjustment must be made to FMV to the extent that the cost of production plus arms-length profit is less than the transfer price. In any case, Koyo, Nachi, the SKF Group, and NSK point out that the matter of appropriate levels of transfer prices between U.S. companies and their foreign affiliates is a matter already heavily regulated by the Internal Revenue Service and monitored by the U.S. Customs Service for the purpose of assessing regular duties.

Respondents also argue that transfer price manipulation does not mean that reimbursement is taking place. For example, INA states that any transfer prices that fail to meet Torrington's test do not constitute payment or reimbursement of antidumping duties. Koyo argues that Torrington fails to provide any logical connection between the practice of intra-corporate transfers of funds and the reimbursement of

antidumping duties. Koyo reasons that any indirect financing or payment from a parent company to its U.S. affiliate is not evidence of reimbursement of duties, but rather a routine business practice that may fulfill any of a myriad of corporate objectives. Koyo maintains that any such transfer is, in any event, internal and not relevant to the antidumping law. NMB/Pelmelec also contends that the transfer of merchandise at less than the cost of production and profit is not the same as a direct payment or reimbursement of antidumping duties.

Moreover, the SKF Group, FAG, GMN, Koyo, Nachi, and NMB/Pelmelec argue that the reimbursement provision in the statute does not apply to transactions between related parties because the statute treats related companies as a single entity. The SKF Group reasons that because the Department treats a foreign producer and its U.S. subsidiary as a single entity for all purposes in calculating weighted average margins, it cannot treat the two companies as separate entities for purposes of the duty payment. The SKF Group argues that, although 19 CFR 353.26(a)(1) does require that, in calculating U.S. price, the Department "will deduct the amount of any antidumping duty which the producer or reseller: (i) Paid directly on behalf of the importer; or (ii) reimbursed to the importer," it does not apply to related parties because section 771(13) of the Tariff Act and 19 CFR 353.41(c) state that the term exporter includes the entity by whom or for whose account the merchandise is imported into the U.S. where the two are related. FAG and Koyo also contend that a parent company and its affiliates, including any U.S. subsidiary, are always considered to be a consolidated entity for dumping purposes. NMB/Pelmelec adds that it is irrelevant which party among related parties actually makes the duty payment.

Finally, the SKF Group, FAG, Nachi, and NSK argue that U.S. subsidiaries cannot have been reimbursed already for duties paid because a dumping duty exists as a matter of law only after U.S. Customs liquidates the entry and the amount of the dumping duty on that entry is known. They state that because the findings of the first review have been challenged by Torrington and Federal-Mogul in the Court of International Trade and because the second review was (at the time of their comments) still incomplete, no dumping duties have been assessed and no entries have been liquidated. Accordingly, respondents assert that no antidumping duties have actually been

paid yet, and therefore, no reimbursements for antidumping duties can exist. To support this conclusion, NSK also argues that the fact that 19 CFR 353.26 appears under Subpart D ("Calculation of United States Price, Fair Value, and Foreign Market Value"), and not under Subpart B ("Antidumping Duty Procedures"), is another reason why USP should not be adjusted to compensate for any reimbursements prior to liquidation.

*Department's Position:* The Department disagrees with Torrington that respondents are reimbursing their U.S. subsidiaries for antidumping duties by manipulating transfer prices.

Money can be transferred between related parties for a variety of reasons and by a number of means, of which manipulation of transfer pricing is only one. Evidence of below-cost transfer pricing between related parties is not in itself evidence of reimbursement of antidumping duties. Torrington has failed to establish a link between alleged below-cost transfer pricing and the payment of antidumping duties. Torrington has also failed to explain the link between transfer pricing at below adjusted USP and antidumping duties. Indeed, Torrington's comparisons of transfer price to adjusted USP do not seem relevant to the argument that the Department should adjust USP downward in all cases where transfer prices were less than COP plus profit and preliminary margins were found. In any case, the antidumping law does not require related parties to set up their internal transactions at arm's length, nor does it prohibit them from transferring money to one another.

In general, Torrington requests that the Department adjust USP where foreign parents are paying antidumping duties on behalf of their U.S. subsidiaries. However, the antidumping statute and regulations make no distinction in the calculation of USP between costs incurred by a foreign parent company and those incurred by its U.S. subsidiary. Therefore, the Department does not make adjustments to U.S. price based upon intracompany transfers of any kind. Indeed, the Department has a long-standing practice of denying adjustments for intra-corporate payments on the grounds that, because affiliated companies are a single entity for the purposes of antidumping law, payments from a parent company to its subsidiary are not expenses to the consolidated corporation as a whole. See Final Determination of Sales at Less Than Fair Value: Mechanical Transfer Presses from Japan, 55 FR 335 (January 4, 1990);



Final Determination of Sales at Less Than Fair Value; Industrial Phosphoric Acid from Belgium, 52 FR 25436 (July 7, 1987).

*Comment 2:* Torrington has argued that the Department should impute and deduct from USP an interest expense for financing of dumping duty deposits where the foreign parent provided such financing. Torrington states that this financing may be effected through manipulation of transfer prices, and is likely to occur where the transfer price is less than cost plus profit.

NSK, Koyo, and FAG-UK state that the Department has consistently determined that antidumping duty deposits should not be deducted from USP. NSK, Koyo, and FAG argue that therefore the interest expenses associated with financing the deposits should be treated in a similar manner, and that the Department should reject Torrington's claim for an adjustment to USP.

FAG-UK and GMN argue that even if it were appropriate to deduct financing expenses from USP, the Department would need much more information than a reported transfer price in order to establish a linkage between an intracompany movement of funds and the provision of financing for duty deposits. GMN contends that Torrington's proposal would amount to a double-penalization of respondents, and would be contrary to the remedial, rather than punitive, nature of antidumping law.

Torrington asserts that the Department should accept reported adjustments for those respondents who demonstrated at verification that the parent company incurred such expenses. For other respondents who have received financing from the foreign parent, whether in the form of artificially low transfer prices or not, the Department should impute and deduct this expense. The amount of the security deposit should be multiplied by the appropriate interest rate and the result deducted from USP. Torrington argues that in cases where the financing has taken the form of artificially low transfer prices, the Department should calculate an additional amount to be deducted from USP.

GMN and FAG-UK point out that if the Department were to adjust USP for this imputed interest expense, then it may be appropriate to use the interest respondents receive on refunded duty deposits to offset the adjustment.

NSK states that the Department verified that the company funds its duty deposits itself, and that therefore no further adjustment to NSK's USP should be made.

*Department's Position:* We disagree with Torrington. The Department's past practice has been not to deduct antidumping duty deposits from USP. Television Receivers, Monochrome and Color. From Japan; Final Results of Review, 55 FR 35916, 35918 (Sept. 4, 1990); Television Receivers, Monochrome and Color. From Japan; Final Results of Review, 54 FR 13917, 13919 (April 6, 1989); Color Televisions Receivers From the Republic of Korea; Final Results of Review, 55 FR 26225, 26227 (June 27, 1990). Therefore, as the security deposits themselves are not considered an expense within the meaning of section 772(d)(2)(A) of the Tariff Act, it would be inappropriate to impute and deduct from USP interest expenses associated with financing these deposits.

*Comment 3:* Torrington suggests that below-cost transfer pricing may result in the underpayment of regular U.S. Customs duties if the transfer prices are inappropriately used as a basis for valuation for U.S. Customs duties. Torrington cites 19 U.S.C. 1401a(b)(2)(B) in support of its argument that related-party transfer prices are appropriate as a basis for U.S. Customs valuation only if (a) the circumstances of the sale indicate that the relationship between the buyer and seller did not influence the price or (b) the transfer price closely approximates another basis of appraisal, e.g., "computed value," which roughly equals cost of production plus profit. Torrington maintains that when below cost transfer pricing is used to reimburse antidumping duties the relationship of the parties is influencing price, and the use of the transfer price as a basis for U.S. Customs duty valuation under these circumstances is inappropriate because it results in the underpayment of U.S. Customs duties. Torrington relates this potential U.S. Customs valuation problem to the current review by arguing that the antidumping duty margins are reduced by below cost transfer pricing since U.S. Customs duties are subtracted from USP.

Torrington requests that the Department communicate with the U.S. Customs Service to ensure that inappropriate transfer prices are not being used as a basis for U.S. Customs duty valuation and further suggests that in such cases the Department should impute the correct Customs duty based on the exporter's sales price and not on the transfer price. Torrington asserts that respondents who manipulate transfer prices so that insufficient U.S. Customs duties are paid on the merchandise may be guilty of fraud

under 19 U.S.C. 1592 (penalties for misstatements in entry papers).

Koyo responds that the U.S. Customs Service closely monitors transfer prices for the purpose of valuation in the assessment of regular duties to assure that they are not too low. Koyo further notes that the Internal Revenue Service monitors transfer prices to assure that they are not too high and suggests that if the Department were to deepen its involvement in this area in the manner suggested by Torrington it could lead to a situation in which respondent companies are confronted by conflicting regulatory demands from different government agencies. Similarly, the SKF Group notes that international corporations must comply with numerous overlapping laws and regulations concerning transfer pricing and maintains that it would be inappropriate for the Department to disrupt their established practices which are in compliance with these treaties, statutes and regulations.

FAG acknowledges that transfer pricing is relevant to U.S. Customs valuation but denies any relevancy in relation to the calculation of the antidumping duty margin.

NSK asserts that Torrington's allusions to U.S. Customs fraud are not substantiated by any evidence. NSK further notes that it, like all importers, must comply with the transfer valuation standards of 19 U.S.C. 1401a(b)(2)(B) and related U.S. Customs laws and that the enforcement of these laws is vested with the U.S. Customs Service, as opposed to the Department.

*Department's Position:* We agree with respondents. We acknowledge that transfer prices that are inappropriately used for U.S. Customs valuation purposes affect the antidumping duty margin to the extent that they cause inaccuracies in the appraisal of U.S. Customs duties, because these duties are subtracted from USP in the margin calculation. However, there is a detailed statutory framework in place that is administered by the U.S. Customs Service and is designed to ensure that inappropriate transfer prices are not used as a basis for U.S. Customs valuation. The Department declines to intervene on behalf of petitioner in this matter absent convincing evidence that the statutory framework is being misapplied. The evidence presented by Torrington of the misapplication of the U.S. Customs valuation statute is insufficient to warrant such intervention.



### 5. Cost-Test Methodology

**Comment 1:** INA-Germany contends that, before resorting to the use of constructed value, the Department should eliminate all sales of models made below cost over an extended period of time from the pool of sales used to determine FMV. It argues that the Department's practice of making comparisons to CV when sales of the identical model or family were disregarded because they were made below cost, rather than exhausting all potential matches of the remaining above-cost sales of such or similar merchandise before using CV, is contrary to the preference for price rather than CV expressed in section 773(a) of the Tariff Act. Although INA notes that section 773(b) of the Tariff Act and 19 CFR 353.51 provide for the use of CV where below-cost sales are disregarded, it claims that the statute and regulations require that priority be given to home market sales of such or similar merchandise over the use of CV in the determination of FMV. Therefore, INA argues that the Department should revise its methodology so that comparisons to CV are made only when there are no usable sales of such or similar merchandise.

**Department's Position:** We disagree with INA's contention that the statute and regulations express a preference for price-to-price comparisons such that the Department must choose the next most similar merchandise over the use of CV in the determination of FMV.

Section 771(16) of the Tariff Act confers upon the Department the authority to determine which merchandise may be reasonably compared to the subject merchandise. It provides a hierarchy of preferences for determining which merchandise sold in the foreign market is most similar to the merchandise sold in the United States. Section 771(16) expresses a preference for the use of identical over similar merchandise, stating categorically that such or similar merchandise is the merchandise which falls into the first hierarchical category in which comparisons can be adequately made. Therefore, although section 771(16) requires us to descend through successive levels of the hierarchy until sales of such or similar merchandise are found, it does not condition such or similar on any basis other than the similarity of the merchandise. In particular, section 771(16) does not require that comparison merchandise be drawn only from merchandise that was sold above cost in the home market.

INA's proposal to eliminate sales of models sold below cost over an

extended period of time from the pool of models from which model match selections are made effectively makes adequate sales above cost a criterion for determining such or similar merchandise. It requires the Department to ignore the presence of the most similar merchandise sold in the home market, and to successively redetermine the next most similar match until an acceptable (*i.e.*, above-cost) but less similar, match is found. Instead, with the methodology used in these final results, we first determine the such or similar merchandise to be used in comparison to the merchandise sold in the United States, and then test sales of that particular merchandise to determine whether they are below cost. Insofar as the statute explicitly requires the determination of the most similar comparison merchandise, INA cannot argue that the Department's method is contrary to the statute.

After identifying such or similar merchandise, the Department implements the cost test required in section 773(b) to determine whether sales were made below cost in substantial quantities over an extended period of time. Since FMV is determined on a model-specific basis, we apply the cost test on a model-specific basis. To determine whether sales below cost occurred over an extended period of time, we calculated the number of units sold above and below cost and compared the number of months in which sales below cost occurred to the number of months in which a model was sold. If a model was sold below cost less than 10 percent of the time, we used all sales of that model for the determination of FMV since below-cost sales were not made in substantial quantities.

If between 10 and 90 percent of the sales were made below cost over an extended period of time, we disregarded the below-cost sales from our analysis and used the remaining above-cost sales as a basis of determining FMV for that model. If more than 90 percent of the sales of a model were made below cost over an extended period of time, we disregarded all sales of that model from our analysis and used CV, since the remaining above-cost sales for that model were inadequate for the purpose of determining FMV. Although section 773(b) expresses a preference for using sales rather than CV as the basis of FMV, it does not instruct the Department to use the next most similar merchandise as the basis of FMV, but rather, it requires the use of CV.

Therefore, for these final results, when sales in the home market of identical, or in the absence of identical,

similar merchandise were inadequate for determining FMV in accordance with section 773(b), we made comparisons to CV rather than search through the hierarchy established in section 771(16) for the next most similar home market model.

The Department disregarded sales below cost for the following firms and classes or kinds of merchandise:

Country	Company	Class or kind of merchandise
France	SKF	BBs.
Germany	FAG	BBs, CRBs.
	GMN	BBs.
	INA	BBs, CRBs.
	SKF	BBs, CRBs, SPBs.
Italy	FAG	BBs.
	SKF	BBs.
Japan	Koyo	BBs, CRBs.
	Nachi	BBs, CRBs.
	NSK	BBs, CRBs.
	NTN	BBs, CRBs, SPBs.
Singapore	NMB/Pelmecc	BBs.
Sweden	SKF	BBs, CRBs.
UK	RHP	BBs, CRBs.
	SKF	BBs.

**Comment 2:** Torrington argues that home market families which have failed the cost test should be eliminated from the pool of potential home market matches when monthly averages are used to calculate FMV. Torrington notes that if all sales of a family are made below cost during a given time period, a U.S. sale which has no identical home market matches in its family would be compared to CV rather than to above-cost sales of other family members at a different level of trade, or in an adjacent period of time. Torrington argues that the computer program should be corrected to eliminate all families that have failed the cost test from the pool of comparison models.

**Department's Position:** We agree. It is our intention to compare sales in the United States to sales of identical, or absent identical, similar merchandise (*i.e.*, families) which have passed the cost test. In our preliminary results, certain comparisons were made to constructed value when there were, in fact, sufficient above-cost sales of the comparison merchandise to warrant the determination of FMV according to the section 773(b) of the Tariff Act. Therefore, for these final results, we have corrected our program to ensure that all appropriate family matches were made.

**Comment 3:** NMB/Pelmecc Singapore argues that the Department incorrectly considers home market sales to be made over an extended period of time if only



one sale of a model was made during the review period.

Torrington contends that NMB/Pelmech's argument is contrary to the Department's precedent, and that it is unsupported by the record.

**Department's Position:** The Department explained its treatment of sales made below cost over an extended period of time in the Issues Appendix of the *Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 56 FR 31730 (July 11, 1991). We stated that when sales of a model (whether above or below cost) occurred in three months or less, below cost sales were considered to be made over an extended period of time only if they occurred in each of the months in which sales were made. Therefore, a single sale of one model that is below-cost fits this definition and is treated accordingly.

#### 6. Profit for Constructed Value

**Comment 1:** Torrington maintains that sales below the cost of production are not in the ordinary course of trade within the meaning of section 773(b) of the Tariff Act, and, as such, should be disregarded in the calculation of the profit component of constructed value. Torrington states that the statute directs the Department to disregard sales below cost of production in the determination of home market and third country price for foreign market value. Therefore, Torrington argues, since constructed value is the functional equivalent of home market and third country price, sales below cost should be disregarded in the determination of profit for constructed value as well. Torrington supports this argument with reference to the legislative history of the 1974 Trade Act. Torrington argues that Congress intended that sales at a loss would not be included in any calculation of FMV. Torrington contends that the reference to any FMV indicates that Congress intended below-cost sales to be disregarded from CV-based FMVs as well as from price-based FMVs. Torrington further points out that international agreements and domestic implementing statutes of Canada, Australia, and the European Communities (E.C.) specify that below-cost sales are outside the ordinary course of trade.

Torrington asserts that the Department's methodology, which includes the below-cost sales in the calculation of profit for constructed value, "create[s] an incentive for [respondents] to structure selling patterns so as to maximize use of

constructed value whenever actual profits on sales exceed the statutory minimum of eight percent." Torrington suggests that the record contains sufficient information to compute profit figures on the basis of "ordinary course of trade" (i.e., above-cost) sales in the home market and that these figures should be used for the final results.

Respondents maintain that it would be incorrect for the Department to disregard below-cost sales in the calculation of constructed value because: (1) It is not supported by a proper reading of the statute; (2) the international agreements and foreign statutes cited by Torrington are not relevant to the administration of the U.S. antidumping law; (3) and it would impose an immense logistical burden on both the respondents and the Department.

**Department's Position:** We disagree with Torrington's contention that the calculation of profit should be based only on sales that are priced above the cost of production. Section 773(e)(1)(B) of the Tariff Act specifically imposes a variety of requirements on the calculation of profit in determining constructed value. Namely, the profit should be equal to that usually reflected in sales: (1) of the same general class or kind of merchandise; (2) made by producers in the country of exportation; (3) in the usual commercial quantities; and (4) in the ordinary course of trade. However, the statute does not provide that below-cost sales be disregarded in the calculation of profit. The detailed nature of this sub-section suggests that any requirement concerning the exclusion of below-cost sales in the calculation of profit for constructed value would be explicitly included in this provision. Accordingly, it would be inappropriate for the Department to read such a requirement into the statute.

It would be similarly inappropriate to circumvent this lack of an explicit statutory requirement mandating the exclusion of below-cost sales in calculating profit for CV comparisons by holding that sales below-cost are automatically outside the ordinary course of trade. When CV is used as the basis for FMV, the Department is required to calculate profit based on sales of merchandise that are, *inter alia*, made in the ordinary course of trade. Contrary to Torrington's assertions, however, in the definition of "ordinary course of trade," section 771(15) of the Tariff Act does not exclude or even mention sales below-cost.

The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise which is

the subject of an investigation, have been normal in the trade under consideration with respect to merchandise of the same class or kind.

Thus, although the Department is required to calculate profit for constructed value based on sales in the ordinary course of trade, this requirement does not necessitate the exclusion of below-cost sales in this calculation.

Finally, section 773(b) of the Tariff Act, which requires the Department to disregard certain sales below the cost of production in the calculation of FMV, does not require the exclusion of below-cost sales in calculating profit for CV because it is explicitly limited to situations where home market or third country sales are used as the bases of foreign market value. In fact, this provision suggests that below-cost sales are not outside the ordinary course of trade, *per se*. Not only are sales made below the cost of production not defined as outside the ordinary course of trade, but an interpretation that "outside the ordinary course of trade" automatically excludes below-cost sales would make the below-cost provision, wherein sales below-cost may be disregarded only if certain conditions are satisfied, entirely unnecessary. Thus, there is no demonstrable link between sales in the ordinary course of trade in section 771(15), below-cost sales in section 773(b), and the calculation of profit for constructed value in section 773(e)(1)(B), that requires the Department to base the calculation of profit only on sales above the cost of production. Torrington's references to the legislative history of the Trade Act in support of its position to the contrary are unpersuasive, and citations of Canadian, Australian, and E.C. law are irrelevant. Consequently, we have continued our normal practice of using the greater of the rate of profit provided in the response or the statutory eight percent minimum.

**Comment 2:** Torrington contends that, if the Department does not calculate NSK's profit for CV on ball bearings based only on sales above the cost of production, it should use a profit rate based on all reported home market sales of ball bearings rather than NSK's reported statutory minimum of eight percent.

**Department's Position:** We disagree with petitioner that reported sales would be the appropriate foundation for a profit rate in a constructed value scenario. Section 773(e)(1)(B) of the Tariff Act directs us to use profit equal to that usually reflected in sales of the same general class or kind of merchandise. The Department, however,



requested of all respondents, and received from NSK, information only on sales of such or similar merchandise. We do not believe that the profit on those sales of such or similar merchandise can be presumed to be representative of the profit for the general class or kind of merchandise. Therefore, because NSK reported a profit of less than eight percent, we have used the statutory minimum of eight percent.

**Comment 3:** Federal-Mogul contends that the general computer program fails to test submitted profit for sales not further manufactured against the statutory minimum. Federal-Mogul argues that the test that is included in the general program compares a calculated revised minimum profit to the existing statutory minimum instead of comparing submitted profit to the calculated revised minimum profit.

**Department's Position:** The general computer program was a nonconfidential version of a particular company's program, which was provided to respondents and petitioners for the purposes of a general disclosure of the computer program for these AFB reviews. The situation noted by Federal-Mogul reflected specific facts applicable to that particular company; it was not a general characteristic of the program used for the other respondents which tested the submitted profit against the statutory minimum and used the higher of the two. Federal-Mogul did not point out any specific instances where there was a problem for particular respondents with the re-calculation of COP and the subsequent test for minimum profit. Consequently, no changes have been made to any of the programs.

#### 7. Assessment, Deposit Rates and "Roller Chain"

**Comment 1:** FAG, GMN and INA argue that the Department lacks authority to apply any duty assessment rate which differs from the weighted-average ESP margin rate. The statute does not permit any post-review adjustment to antidumping duties and makes no reference to the difference between entered value and USP.

FAG, GMN and INA also argue that it is inappropriate for the Department to use the entered value of sales during the period of review to calculate an assessment rate that will be applied to the entered value of merchandise entered during the period, because some of the reviewed sales may have involved merchandise that was imported prior to, or after, the period of review.

FAG and GMN further argue that adjusting the weighted-average ESP rate is improper because entered values may not be the same as appraised values (the dutiable values which the U.S. Customs Service derives from information available about the value of the merchandise). In the case of related-party transactions, the U.S. Customs Service regulations provide that the transaction value will be the appraised value only under certain circumstances. Thus, any assessment rates based on entered values may be completely or partially distorted by the U.S. Customs Service's appraisal at the time of liquidation.

FAG and GMN also contend that antidumping duty assessment rates must be the same as the calculated deposit rates. The Department itself has stated that it is inappropriate to use different methodologies to calculate margins for assessment and cash deposit purposes.

Finally, GMN contends that the Department's proposed method for calculating assessments rates would penalize companies for charging higher prices in the United States.

**Department's Position:** Section 751 of the Tariff Act requires that the Department calculate the amount by which the foreign market value exceeds the U.S. price and assess antidumping duties on the basis of that amount. However, there is nothing in the statute that dictates how the actual assessment rate is to be determined from that amount.

In accordance with section 751, the Department calculated the amount of the difference between FMV and USP (the dumping margin) for all reported U.S. sales. We have calculated assessment rates based on the total of these differences such that each person liable for antidumping duties is only liable for the duties related to that person's entries. In ESP cases, the Department generally cannot tie sales to entries and therefore cannot link the amount of antidumping duties determined for any specific sale to the specific entry or entries of that same merchandise. In addition, determination of antidumping duties for every entry based on the sale of that merchandise is impossible where dumping margins have been based on sampling, even if sales could be tied to entries. Therefore, in order to achieve a fair assessment of antidumping duties based on the difference between FMV and USP for sales reviewed, we have expressed this difference as a percentage of the entered value of those sales for each exporter/importer. We will direct the U.S. Customs Service to assess antidumping

duties by applying that percentage to the entered value of each of that importer's entries of subject merchandise under the relevant order during the review period. (For ESP sales, the assessment rates we calculated are importer-specific *ad valorem* rates for each class or kind of merchandise. We calculated these assessment rates on the basis of the ratio of the total value of antidumping duties, which is equal to the total amount of dumping margins, calculated for the examined sales to the total entered value of the sales used to calculate those duties. This is equivalent to dividing the aggregate dumping margins, *i.e.*, the difference between statutory FMV and statutory USP for all sales reviewed, by the aggregate USP value of those sales and adjusting the result by the average difference between USP and entered value for those sales. By adjusting the result for the average difference between USP and entered value we mean multiplying the result by the ratio of aggregate USP value of the reviewed sales to their aggregate entered value.)

Just as FAG and GMN correctly argue that we cannot apply duty assessment rates based on entered values to appraised values for the reason that appraised values may be different from entered values, we likewise cannot apply rates based on USP to entered values, which we know are different. For assessment of antidumping duties on ESP entries, we expressed the difference between FMV and USP as a percentage of entered value, because entered value is information available to the U.S. Customs Service. We cannot assess duties at a rate based on USP, because the U.S. Customs Service does not know the USP for each entry and does not have the information to calculate USP. As stated above, sales generally cannot be linked to entries and therefore the USP for each entry cannot be calculated.

While the Department is aware that the entered value of sales during the POR is not necessarily equal to the entered value of entries during the POR, use of entered value of sales as the basis of the assessment rate permits the Department to collect a reasonable approximation of the antidumping duties which would have been determined if the Department had reviewed those sales of merchandise actually entered during the POR. In the final results of the first administrative review (*See* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 FR



31692 (July 11, 1991)), we stated our intention for future reviews of nonsampled ESP sales to assess the precise aggregate difference between FMV and USP calculated for sales during the review period by assigning to each entry during the review period a proportionate amount of that aggregate difference. However, in our preliminary results of these second reviews we did not propose to use that approach; rather, we proposed to use the method of assessment that was used for the first review period. Since no interested party commented that the Department should adopt the method it outlined in the first review final results for future reviews, we have not adopted that approach in response to comments received. We have considered all alternatives suggested in those comments and find those alternatives to be inferior to the assessment method described in the preliminary results.

Furthermore, there is no demonstrated distortion of assessment rates due to reliance on entered values outside the review period since we generally did not use entered values outside the review period. Because firms usually cannot tie sales to entries in ESP situations and because we sought reasonable measures to simplify these reviews and make them manageable, we did not request any respondent to attempt to link ESP sales to entries either for purposes of determining which ESP sales to report or for determining entered values. In order to determine entered values for merchandise sold during the period, our questionnaire asked respondents to report the average entered value for any given model for the period of review. Thus, to the extent that there was any entry during the POR of merchandise identical to that sold during the POR, entered values during the period of review were precisely the basis of our calculations. Furthermore, no party has shown that it had to rely substantially on entered values outside the POR, much less that those entered values distorted the results.

The Department is aware that entered values are not always identical to appraised values. However, the U.S. Customs Service maintains records of both entered values and appraised values. Our instructions to the U.S. Customs Service will specify that the assessment rates should be applied to entered, not appraised, values.

We disagree with FAG's and GMN's argument that assessment and deposit rates must be calculated in the same way. For the reasons discussed above, it would not be appropriate to calculate assessment rates relative to USP and

apply them to entered values. Neither would it be appropriate to use the calculated assessment rates for cash deposit purposes. See Comment 4 below.

Finally, we also disagree with GMN's contention that the Department's method of calculating assessment rates would penalize companies for charging higher prices in the United States. One must distinguish between the assessment rate and the amount of assessed duties. To the extent that the assessment rate is increased by the use of entered values, the value to which that rate is applied is lowered, thereby nullifying any possible distortion.

*Comment 2:* NTN contends that an assessment methodology based on a percentage, rather than on a per-piece or fixed-sum basis, is preferable because any other method of assessment could potentially distort the antidumping duties assessed. FAG contends that the Department's use of per-unit assessment rates is inappropriate, because there may be a large disparity between quantities entered during the period and quantities sold. Caterpillar also argues that the Department's proposed methodology appears to assume that the number of sales made during the period of review will equal the number of entries made. According to the Department's preliminary results, an average per-unit dollar amount of dumping duty based on all sales examined during the period of review will be used in instances where there is no entered U.S. Customs value to calculate an *ad valorem* rate. This average amount would then be assessed by U.S. Customs Service on all units included in each entry made by the particular importer during the period of review. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Preliminary Results of Administrative Review, 57 FR 10862, 10864 (March 31, 1992). Caterpillar argues that this method must not result in excess collection of antidumping duties at assessment.

*Department's Position:* The Department calculated *ad valorem* rates for assessment of ESP transaction dumping liabilities and per-unit amounts for assessment of purchase price (PP) transaction dumping liabilities (for each appropriate class or kind of merchandise). In ESP situations where a respondent did not provide entered values, the Department calculated a proxy for the entered value of the subject merchandise.

For purchase price sales, we calculated per-unit assessment rates, by importer, by dividing the total amount of

dumping margins (the aggregate difference between FMV and USP) found for sales reviewed by the total quantity of merchandise sold. We will direct the U.S. Customs Service to assess the resulting dollar amount per unit against each unit of subject merchandise entered by the relevant importer during the review period. Since units entered and units sold are almost identical in purchase price situations, we do not agree that the per-unit assessment calculation will result in a gross distortion of the dumping duty liability nor is there any compelling evidence on the record to suggest otherwise. This is the best means of assessing antidumping duties for purchase price sales. Whereas for ESP sales we can calculate *ad valorem* assessment rates using entered value, purchase price sales do not allow us to use *ad valorem* assessment rates because, in most instances, the entered value for purchased price sales reviewed is not known since the respondent is not the importer.

*Comment 3:* Fiat asserts that under the current assessment rate methodology for ESP sales, there is a substantial risk of distorted assessment and premature liquidation of entries of AFBs not sold during the POR. The respondent attributes such risk to disparities between a given importer's entries and sales during a POR. Accordingly, Fiat proposes that the Department calculate a per-unit duty amount for all reviewed sales and apply that amount to units entered, but only up to the number of units actually sold during the POR. Those entries for which sales had not yet occurred would be held over for liquidation in a subsequent review.

If the Department does not adopt the above methodology as general approach, Fiat proposes that, at a minimum, liquidation be deferred with respect to any class or kind of merchandise for which an importer-specific assessment rate cannot be calculated due to the absence of any sales of that class or kind to a particular importer during the review period.

*Department's Position:* Fiat's proposed methodology of limiting liquidations to the quantity sold during the POR is not a viable alternative. The operational structure of the U.S. Customs Service renders it incapable of monitoring the number of entries liquidated and ceasing liquidation upon the attainment of a company-specific quantity.

The Department recognizes, however, that the assessment methodology it has adopted does not provide for those situations where there are entries of a



certain class or kind of merchandise for a particular importer but no sales of that class or kind to the importer during the review period upon which to base the assessment rate. Accordingly, the Department agrees with Fiat that liquidation of such entries should be deferred until the next review period in which sales of that class or kind do occur with respect to the affected importer. If no review is requested for the next review period, whether or not there were appropriate sales in that period, then the subject entries will be liquidated at the cash deposit rate.

To the Department's knowledge, Fiat is the only respondent whose circumstances conform to the situation outlined above. During the previous review period, although two importers had entries of certain classes or kinds of Fiat bearings, there were no sales of those classes or kinds by Fiat to the respective importers. Because sales of each of these classes or kinds did occur during this review period and in these instances sales generally occurred after importation, the Department will instruct the U.S. Customs Service to liquidate the entries during both periods at the assessment rate calculated on the second review sales.

**Comment 4:** Federal-Mogul contends that since the cash deposit rate is applied to entered values of future entries, the Department's policy of calculating this rate as a percentage of statutory USP rather than as a percentage of entered value results in an undercollection of cash deposits on future entries. This deprives the domestic industry of the full extent of the interim relief Congress intended to provide.

**Department's Position:** Whereas we calculated importer-specific assessment rates, we calculated exporter or manufacturer-specific deposit rates in accordance with long-standing Department practice.

Under any method of calculating cash deposit rates, there would be no certainty that the cash deposit would equal the amount by which foreign market value exceeds U.S. price. As the Department has stated on numerous occasions, duty deposits are merely estimates of future dumping liability. Should the amount of the deposits of estimated antidumping duties be less than the amount assessed, the Department will instruct the U.S. Customs Service to collect the difference with interest, as provided for under sections 737 and 778 of the Tariff Act and 19 CFR 353.24.

Furthermore, in many instances, we do not know the entered value related to purchase price sales and therefore

cannot calculate a deposit rate in the same manner as we calculated ESP assessment rates. To allow for this circumstance, the Department would have to use importer-specific deposit rates and different bases for deposit rates for each importer. However, as we stated in the final results of the first review of AFBs, we believe that the need for a precise estimate is outweighed by the need to provide the U.S. Customs Service with a set of deposit rates which can be effectively administered.

In addition, we must maintain a consistent standard for determining whether weighted-average dumping margins are de minimis. We do not wish to calculate weighted-average rates relative to USP values in one review or case and relative to entered values or other values in another review or case. The assessment rates we calculated in these reviews are a mechanism for collecting the appropriate amount of antidumping duties and are not fair bases for determining whether any dumping by these exporters or manufacturers is de minimis.

Finally, we must maintain the same basis for determining whether weighted-average dumping margins are de minimis and whether cash deposits are required. Otherwise, interested parties may face conflicting interests in requesting reviews. Cash deposits may be required on an exporter's shipments even though that exporter's rate of dumping was found to be de minimis. Thus, the exporter would risk its de minimis status to obtain refunds of deposits through a review. Likewise, a petitioner might have to request a review with respect to a particular exporter, whose merchandise was free of cash deposits, to have antidumping duties collected even though the exporter was previously found to be dumping at more than a de minimis rate.

**Comment 5:** Dassault, MBB, Turbomeca, and ADH contend that the Department should reaffirm its application of the "Roller Chain" principle in the final results of this administrative review by not assessing antidumping duties on bearings incorporated into higher level products after importation if they represent an insignificant percentage of the value of that higher level product. (The "Roller Chain" rule excludes from the scope of an order bearings which were imported by a related party and further processed, and which comprise less than one percent of the finished product sold to the first unrelated customer in the United States.) These respondents assert that they have provided information on the record which shows

that the percentage value of bearings incorporated into higher level products by their U.S. subsidiaries is less than one percent of the value of the finished good. Accordingly, they contend, the "Roller Chain" principle should be applied to their U.S. imports of these bearings. Moreover, Dassault, MBB, Turbomeca, and ADH argue that the Department should adopt the same methodology from the first review in determining the assessment rate for "Roller Chain" cases. In applying that decision for companies that posted deposits of estimated antidumping duties on all of its bearing entries, the Department determined the liquidation rate by dividing the total dumping dollars calculated on the non-excluded sales by a denominator that included both the value of the excluded and non-excluded bearings. Using this approach, the total amount of antidumping duties actually assessed would equal only the antidumping duties owed on the non-excluded bearings.

**Department's Position:** These respondents provided the Department with an AFBs-to-finished good breakdown by value of all AFBs incorporated into finished goods in the U.S. by their U.S. subsidiaries. In each case, the value of the AFBs incorporated into the finished product was less than one percent. Therefore, the assessment rates for these firms will be appropriately adjusted so that no antidumping duties are collected for this merchandise. We have incorporated the value of the AFBs meeting the "Roller Chain" criterion into the denominator used in the calculation of assessment rates with no additional duties in the numerator.

For calculation of ESP assessment rates, we similarly accounted for the value of entries for which liquidation was suspended, but which ultimately fell outside the scope of the orders through operation of the "Roller Chain" rule, to avoid overcollecting. Cash deposits of estimated antidumping duties will be required for all future entries, including entries of bearings potentially excludable from assessment under the "Roller Chain" rule, based on the manufacturer's or exporter's deposit rate for the appropriate class or kind of merchandise.

**Comment 6:** Dassault contends that two of its subsidiaries, APRO and Midway, should be excluded from further duty deposit requirements because they import bearings exclusively for assembly into higher level products. Dassault requests that the Department determine that bearings



imported by APRO and Midway should not be subject to the order.

Torrington argues that the Department lacks the authority to implement the respondent's proposed exclusion of APRO and Midway from deposit requirements according to the principle outlined in final results of the first administrative reviews of AFBs. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Administrative Review*, 56 FR 31702 (July 11, 1991).

**Department's Position:** While we are not compelled by definition of the cash deposit rate to collect deposits on all future ESP entries, we have no way of knowing at the time of entry whether the "Roller Chain" principle will operate to exclude any particular entry from the scope of the order. We cannot, therefore, accept any proposal which would limit the collection of antidumping duty deposits on merchandise which may ultimately be subject to the order.

**Comment 7:** For administrative efficiency, Dassault, MBB, Turbomeca, and ADH suggest that the Department should establish a process to permit refunds of estimated antidumping duties posted on excluded bearings without the need to conduct a full administrative review. They propose a hybrid review procedure for "Roller Chain" cases for those instances in which a full administrative review is not requested but an adjustment of the liquidation rate is necessary in order to ensure that antidumping duties are not assessed on the excluded bearings. This procedure would involve submitting an annual summary (subject to verification) showing the value of excluded and non-excluded merchandise, and the total deposits of estimated antidumping duties posted on that merchandise. The Department could then utilize this information to calculate the appropriate liquidation rate, defined as (a) the amount of estimated antidumping deposits posted on the non-excluded bearings only, divided by (b) the total value of the excluded and non-excluded bearings. Using this procedure, the amount of estimated antidumping duties deposited on the excluded bearings would be refunded at the time of liquidation.

Torrington argues that the Department does not have the statutory framework to adopt the hybrid procedure proposed by the respondents because assessment of duties is on the basis of an administrative review procedure according to 19 U.S.C. 1675(a)(2). Torrington further states that the Department's authority to simplify its

procedure is limited to its sampling and averaging authority. Torrington contends that if the Department does not conduct a review, duties would then be assessed at the deposit rate.

**Department's Position:** For purposes of this review, the Department has not adopted the hybrid methodology delineated by the respondents since, inter alia, this proposal was not submitted for consideration on a timely basis. However, for future reviews, the Department will entertain timely proposals for simplifying the administrative review process for companies that post deposits on merchandise claimed to be excluded under the "Roller Chain" principle.

**Comment 8:** SKF argues that the Department's assessment rate calculation incorrectly computed the declared value for SKF's imports. SKF maintains that instead of subtracting ocean freight and in some instances marine insurance from the reported transfer price, the Department should have multiplied the transfer price by the reported declared value factor. According to SKF, the declared value factor was developed to account for the basis upon which SKF-USA incurs duty expense because SKF-USA maintains transfer price as opposed to the actual declared value of shipments in its computer records. Moreover, this adjustment factor captures the elements which constitute the difference in value between transfer value and declared value. SKF further argues that the Department's methodology erroneously reduces transfer value by subtracting movement expenses instead of the desired effect of increasing the transfer value to account for landing costs. This approach, SKF concludes, does not reflect the value elements which comprise the difference between declared value and transfer value; rather, it eliminates from transfer price movement expenses not included in the transfer price and which are unrelated to declared value.

Federal-Mogul contends that the Department's calculation of U.S. customs entered value for SKF is grossly overstated because it is derived by subtracting certain international movement charges from unit price. Federal-Mogul maintains that this erroneous calculation has had the corresponding effect of understating SKF's calculated assessment rate. Federal-Mogul asserts that the Department should correct its calculation of customs' entered value by basing this value upon SKF's submitted transfer price adjusted by SKF's declared value factor.

Torrington argues that the Department should continue to calculate declared value by deducting ocean freight and marine insurance from transfer value since SKF failed to report actual Customs declared value and instead substituted this information with its own methodology of increasing transfer value by applying an adjustment factor.

**Department's Position:** SKF provided a description of its declared value calculation methodology in its questionnaire response. We are satisfied that the entered values derived by SKF's methodology are reasonably accurate. Therefore, for these final results, we used the information submitted by SKF-USA to determine declared value.

**Comment 9:** Torrington asserts that Koyo failed to provide sufficient information to demonstrate that the "Roller Chain" rule is applicable to certain identified merchandise. Specifically, Torrington claims that Koyo failed to provide the entered values and resale prices of the identified merchandise, and the further processing analysis for one particular imported bearing model. Consequently, Torrington claims that the record is inadequate with respect to the sales identified as subject to the "Roller Chain" rule and, therefore, the Department should include such sales in its analysis of U.S. price for the final results.

Koyo argues that Torrington has no factual or legal basis to support its allegations. Koyo further argues that it has made substantial and good faith efforts to provide the Department with all necessary information and that to penalize it on the basis of Torrington's unsupported allegations would be improper.

According to Koyo, the entered values and estimated resale prices of its identified "Roller Chain" merchandise were reported by letter of December 23, 1991. Koyo acknowledges that it did not provide a further processing analysis for one particular model, but explains that the manufacturers of the finished merchandise, who are related to Koyo, refused to provide Koyo with the information necessary to conduct a further processing analysis. By Koyo's estimate, the value of this one model exceeds the one percent "Roller Chain" threshold by only a tiny amount. Therefore, Koyo requests that the Department treat it as merchandise subject to the "Roller Chain" rule.

**Department Position:** The "Roller Chain" rule operates to exclude from the scope of an order further-processed bearings imported by a related party which comprise less than one percent of



the finished product sold to the first unrelated customer in the United States.

The Department determined that Koyo did provide sufficient information to demonstrate the applicability of the "Roller Chain" rule to certain identified merchandise. By letter of December 23, 1991, Koyo reported the entered values and estimated resale prices of the identified "Roller Chain" merchandise. However, the value of one particular imported bearing model exceeds one percent of the finished product sold to unrelated customers. Accordingly, importations of that model are not excluded from the scope of the relevant order by application of the "Roller Chain" principle and, therefore, should not have been excluded from Koyo's U.S. sales listing.

Because Koyo was unable to provide the necessary further manufacturing information for an analysis of dumping margins for sales of this model, the Department applied a BIA rate to these sales. We used the quantity entered as the quantity sold for the model and we estimated the USP of the model by applying to the entered value of the model the average ratio of USP to entered value for all other Koyo sales of the same class or kind of merchandise involving U.S. further manufacturing. We determined the total amount of antidumping duties for the model by multiplying the total USP value by the weighted-average margin for Koyo from the investigation; that margin was the best information available.

#### 8. Best Information Available

Section 776(c) of the Tariff Act requires the Department to use BIA "whenever a party or any other person refuses or is unable to produce information requested in a timely manner or in the form required, or otherwise significantly impedes an investigation."

In deciding what to use as BIA, the Department's regulations provide that the Department may take into account whether a party refuses to provide requested information. 19 CFR 353.37(b). Thus, the Department may determine, on a case-by-case basis, what constitutes BIA. For the purposes of these final results of review, we applied the following two tiers of BIA in situations where we were unable to use a company's response for purposes of determining that company's dumping margin:

1. When a company refused to cooperate with the Department or otherwise significantly impeded these proceedings, we used as BIA the higher of (1) the highest of the rates found for any firm for the same class or kind of

merchandise in the same country of origin in the less than fair value investigation or prior administrative reviews; or (2) the highest rate found in this review for any firm for the same class or kind of merchandise in the same country of origin.

2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we used as BIA the higher of (1) the highest rate (including the "all others" rate) ever applicable to the firm for the same class or kind of merchandise from either the LTFV investigation or a prior administrative review; or (2) the highest calculated rate in this review for the class or kind of merchandise for any firm from the same country of origin.

Listed below is a company-by-company summary of our use of total BIA applied in these final results of review. Total BIA was applied where we were unable to use a company's response for purposes of determining that company's dumping margin.

#### A. First-Tier BIA

(i) *INA-France*: INA did not respond to our questionnaire. Therefore, we applied the first-tier BIA to each class or kind of merchandise.

(ii) *SNFA-France*: SNFA did not respond to our questionnaire. Therefore, we applied the first-tier BIA to each class or kind of merchandise.

(iii) *Minebea-Japan*: Minebea did not respond to our questionnaire. Therefore, we applied the first-tier BIA to each class or kind of merchandise.

#### B. Second-Tier BIA

(i) *Nippon Pillow Block Sales*. NPBS submitted responses to all sections of the questionnaire and agreed to undergo verification. However, at verification, we discovered that the firm had failed to report a substantial number of its home market sales. Although NPBS provided some information, the quantity of this information was not sufficient or adequate to form a basis to calculate foreign market value. Therefore, we have relied exclusively upon BIA to determine NPBS's dumping margin. Nevertheless, because NPBS attempted to submit some information, we applied the second tier of BIA as described above. For these final results, for NPBS that rate is 45.83 percent, which is the firm's rate from the previous review.

(ii) *Yamaha Motor Co., Ltd./Yamaha Motor Corp. USA*. Yamaha also responded to all sections of the questionnaire and agreed to undergo verification. At verification, the

Department determined that Yamaha was unable to provide proof of payment for sales to related distributors in the home market, misrepresented its home market distribution system in its response, and failed to report sales in the home market at the proper level of trade, in addition to identifying certain methodological problems with its response. Although Yamaha provided some information, the quantity of this information was not sufficient or adequate to form a basis to calculate foreign market value. Therefore, we have relied exclusively upon BIA to determine Yamaha's dumping margin. Nevertheless, because Yamaha attempted to submit some information, we applied the second tier of BIA as described above. Because the "all others" rate assigned to Yamaha by the LTFV investigation exceeded its rate from the prior review or any calculated rate for this review, we used that rate of 45.83 percent as BIA for Yamaha.

(iii) *Uchiyama Manufacturing Corporation*. Uchiyama submitted responses to all sales sections of the questionnaire. However, Uchiyama did not provide model-specific costs for any models that it sold. In addition, Uchiyama failed to provide constructed value for any of the models sold in the United States. Although Uchiyama provided some information, the quantity of this information was not sufficient or adequate to form a basis for foreign market value. Therefore, we have relied exclusively upon BIA to determine Uchiyama's dumping margin. Nevertheless, because Uchiyama attempted to submit some information, we applied the second tier of BIA as described above. Because the "all others" rate assigned to Uchiyama by the LTFV investigation exceeded any calculated rate for this review, we used that rate of 45.83 percent as BIA.

#### C. Partial BIA

In certain situations, we found it necessary to use partial BIA. Partial BIA was applied in cases where we were unable to use some portion of a response in calculating a dumping margin. The following is a general description of the Department's methodology for certain situations.

In cases where a firm was deemed cooperative but failed to supply certain FMV information (i.e., corresponding home market sales within the contemporaneous window or constructed value data for a few U.S. sales), we applied the BIA rate for cooperative firms (see above) and limited its application to the particular transactions involved.



For firms that did not have their own rate in the LTFV investigation, we used the rates listed below for partial BIA. Except where noted, these rates are based on the "all others" rates from the final determinations in the LTFV investigations.

Country	Ball (percent)	Cylindrical (percent)	Spherical (percent)
France.....	65.13	17.31	<sup>2</sup> 42.79
Germany.....	68.89	55.65	114.52
Italy.....	155.57	212.45	N/A
Japan.....	45.83	<sup>1</sup> 51.82	84.33
Romania.....	39.61	N/A	N/A
Singapore.....	25.08	N/A	N/A
Sweden.....	180.00	13.69	N/A
Thailand.....	20.40	N/A	N/A
United Kingdom.....	54.31	<sup>2</sup> 48.29	N/A

<sup>1</sup> From the "all others" rate in the 1st administrative review.

<sup>2</sup> From the "all others" rate in the 2nd administrative review.

Where any adjustments (*i.e.*, deductions) or charges to home market prices or CV, such as freight or differences in merchandise, were missing from the sales listings, we have denied claims for the adjustments or charges because the respondent has failed to satisfy its burden of proof to be entitled to the adjustment. We have assigned a value of zero to the claimed adjustments where such information is missing. If adjustment information for differences in merchandise was missing from the U.S. sales listing, we used the above to determine the BIA rates to use as the margins for these particular transactions. If other U.S. adjustment information such as freight charges were missing, we used other transactional information in the response to estimate these expenses. Where respondents did not establish that expenses were either indirect in the U.S. market or direct in the home market, we generally treated them as direct in the U.S. market and indirect in the home market.

The following comments were received concerning BIA issues:

**Comment 1:** Torrington states that the Department correctly applied a total BIA rate to NPBS because of NPBS's failure to provide an adequate HM response in a timely manner and in the form required by the Department. NPBS reported only contemporaneous HM sales in its HM database, rather than all sales of a model or family which match a model sold in the United States. Torrington argues that the Department cannot use this incomplete HM database to calculate a dumping margin, and has, in the past, used a total BIA rate for respondents in similar situations.

NPBS argues that the use of BIA is unreasonable and unsupported by the record. NPBS contends that it cooperated fully with the Department and answered all sections of the questionnaire. The Department has on the record virtually all the information it would use in calculating a margin, and virtually all the submitted data were verified.

Emerson argues that BIA should not be applied to NPBS, and that the effect of applying a BIA rate is punitive, rather than remedial, which contravenes both U.S. and international law. Emerson argues that the Department's submission requirements were ambiguous, and that NPBS should not be penalized for an inadvertent misinterpretation of the questionnaire. The record in this case indicates that NPBS cooperated fully with the Department and made a substantial effort to comply with the Department's requirements.

Emerson contends that the Department should base NPBS's margin on the data submitted during the review. The additional data not contained in NPBS's original HM response would have been used only if an annual-average FMV were utilized for NPBS. NPBS submitted all data which would have been used for a monthly-average FMV.

Emerson states that Torrington argues that NPBS's data should be rejected in favor of BIA because the company submitted data on a sampled basis. Emerson states that this argument is incorrect, because NPBS complied with the Department's request for sampled HM data.

**Department's Position:** We have determined that total BIA will be used for NPBS in the final results of review. This decision is based on the fact that NPBS did not report requested HM sales information in a timely manner and in the form required. NPBS failed to report over 80 percent of its home market sales in its response to the Department's questionnaire. A home market database containing only 20 percent of required sales is not an adequate basis for analysis and calculation of foreign market value.

**Comment 2:** NPBS contends that the Department should use its response to Section A of the questionnaire to calculate annual-average FMVs. The company argues that the sales data which it excluded from the HM database was contained in the Section A response, and that therefore the Department is incorrect in stating that NPBS failed to report all appropriate HM sales. NPBS argues that because the

data is in fact on the record, although in a different format, there is no real error.

Torrington disagrees with NPBS's contention that the Department could utilize the sales data reported in Section A to conduct an annual average test on HM sales. However, Section A data is not submitted in a format which would allow this type of analysis, nor is all appropriate adjustment information included.

**Department's Position:** NPBS's argument that its Section A response contains all of the required sales, and that the Department could use that response to test for price stability, is without merit. Section A data is reported in a different format from that required for the HM database, and does not contain all adjustment information necessary to calculate an annual-average FMV or, if appropriate, a monthly-average FMV.

**Comment 3:** NPBS contends that the determination to use total or partial BIA should consider the impact of the alleged deficiency on the results of review. NPBS argues that the data not reported in its original Section C response would not have a critical impact on the margin because it would have been used only to calculate an annual-average FMV, and would not have been used for matching purposes.

NPBS argues that if any form of BIA is to be used, the Department should average the price change of annual price changes over monthly price changes for all other Japanese respondents, and apply that percentage to NPBS's HM prices.

NPBS also argues that if any BIA is to be used, it should apply only to that rebate information contained on the March 6, 1992 computer tape which had not previously been submitted to the Department. NPBS argues that where data on small adjustments is missing, it is the Department's practice to apply BIA only to those adjustments, rather than to the entire submission.

NPBS also argues that if BIA is to be used at all, it should be limited to an alteration of the labor allocation methodology used in the cost of production response. NPBS suggests that the Department could either use the difference between its timing of the production process and NPBS's response to adjust labor costs, or use an average labor cost as a ratio to costs provided by all other Japanese respondents.

Emerson argues that the Department should use NPBS's submitted and verified data for the calculation of a margin. If BIA is to be used at all, an adjustment could be made for the amount beyond which annual prices



would vary before the Department would resort to annual average FMVs.

*Department's Position:* We have determined that a total BIA rate is appropriate for NPBS in this review. See Comment 1 above.

*Comment 4:* NPBS states that it limited the number of sales reported in its HM database due to a misinterpretation of the Department's questionnaire. NPBS states that the questionnaire instructions are ambiguous and open to more than one interpretation, and therefore NPBS should not be penalized for following an inadvertent misinterpretation.

Emerson states that the questionnaire instructions were not entirely clear, and subject to varying interpretations. NPBS should not be penalized for a misinterpretation of the instructions.

Torrington states that the language in the questionnaire relating to reporting requirements was sufficiently clear that it was apparently understood by all other respondents. It is the responsibility of the respondents to apprise themselves of the requirements. Torrington argues that had NPBS provided a description of its methodology earlier in the review process, the Department would have had an opportunity to note the deficiency and request a correction.

*Department's Position:* The Department's questionnaire clearly states that if respondents have any questions regarding the requirements, they should contact the Department for clarification. If a respondent found the requirements to be unclear, then the burden is on the respondent to ask the Department for guidance. The reporting requirements in the questionnaire were sufficiently clear to allow all other respondents to respond in the appropriate manner.

*Comment 5:* NPBS argues that the responsibility for its error in reporting only limited sales in its HM response lies with the Department. NPBS states that the Department should have noted that the difference in quantities reported in Sections A and C represented an error in reporting. NPBS also states that the Department should have been more clear in explaining its requirements. In addition, NPBS states that the Department was in error in not verifying Section A data.

NPBS also argues that the Department's analysis of the Section A tape, which showed that NPBS limited the number of HM sales in that response, is wrong because the computer tape contained all HM sales.

Torrington contends that NPBS should not be allowed to shift the blame for its mistake to the Department. Torrington

disagrees with NPBS's comment that the Department should have verified Section A. Torrington asserts that once the deficiency with Section C was identified, the Department was not obligated to construct a new response using Section A data. Torrington notes that subsequent analysis by the Department has shown that the Section A database was also incomplete. Department was not under an obligation to repeat its request, nor was it obligated to delay the verification for an outside consultant to assist the respondent. During verification, the burden is on the respondent to provide sufficient resources to comply with requests from the verification team.

*Department's Position:* Prior to verification, the Department had no indication that NPBS had used an incorrect method of reporting its HM sales. If NPBS had sought clarification from the Department earlier in the review, the error could have been identified and rectified through a supplemental questionnaire.

Once the missing sales were discovered, the Department was under no obligation to construct a new response. The sales information in Section A is in a different format than Section C. In addition, the adjustment information contained in Section C, and necessary to calculate either annual average or monthly average FMVs, is not reported in Section A. Therefore, a Section A response cannot be used as a substitute for a complete and accurate Section C submission.

*Comment 6:* Torrington argues that the Department's determination to use the most-adverse BIA rate of 106.61 percent for NPBS is correct. Torrington argues that in making a determination of which BIA rate to apply, the Department should consider the adequacy of the response on the record and the degree of cooperation exhibited by the respondent. Torrington states that because the HM database contains only approximately 20 percent of the required sales, it is clearly inadequate and cannot be used as the basis for a margin calculation. It also contends that NPBS was uncooperative and has impeded the administrative review process by refusing to provide the Department with verifiable HM sales information when it was requested.

NPBS argues that the use of the most-adverse BIA rate is inappropriate and not supported by the facts of this case. NPBS states that the record clearly shows that the company cooperated fully with the Department throughout the review and in no way impeded the course of the review. NPBS has responded to all appropriate sections of

the questionnaire, and has made a good-faith effort to comply with the Department's requirements. All HM sales were reported, although in two different submissions, and therefore the Department cannot base its BIA determination on the allegation that NPBS refused to provide a complete HM database. NPBS contends that it did not refuse to provide information to the verification team, but rather was unclear about the team's request. NPBS states that the vast majority of its data were verified without discrepancies.

Emerson argues that the most-adverse BIA should not be used for NPBS. Emerson states that the Department's reporting requirements regarding HM sales were unclear and subject to varying interpretations, and that NPBS should not be penalized for an inadvertent misinterpretation.

Federal-Mogul asserts that because Emerson did not participate in the preparation of NPBS's responses, Emerson is not in a position to be knowledgeable regarding whether NPBS's error was intentional or inadvertent. Federal-Mogul argues that the Department was correct in applying the most-adverse BIA rate to NPBS due to NPBS's refusal to provide required information.

Torrington argues that NPBS's characterization of its error as an inadvertent misinterpretation should not be used by the Department as a justification for rejecting a most-adverse BIA rate. Such a determination by the Department could encourage non-compliance in the future from other respondents.

Torrington states that if the Department should determine, in any event, that NPBS has been cooperative and that its response merits a more favorable BIA rate, the rate accorded to NPBS in the previous review should be used. To use a lower rate would in effect reward the respondent for providing an inadequate response.

*Department's Position:* In the preliminary results, we used the most adverse, or first-tier BIA for NPBS. For these final results of review, we have used a second-tier BIA rate of 45.83 percent for NPBS, which is the firm's rate from the previous review. This determination was based on the fact that NPBS did not totally refuse to cooperate with the Department. NPBS responded in a timely manner to all sections of the questionnaire. However, the company failed verification when it did not provide adequate information to the Department regarding the unreported sales data. The information submitted by NPBS was not sufficient or



adequate to form the basis for calculating foreign market value.

*Comment 7:* NPBS compares its situation with that of Asahi in the first review, and Uchiyama in the current review. Both companies were accorded a less-adverse BIA due to the Department's determination that they made a reasonable effort to cooperate. NPBS argues that based on these determinations of reasonable cooperation, the Department is unwarranted in stating that NPBS is uncooperative.

Emerson argues that the use of the most-adverse BIA for NPBS is inconsistent with its treatment of other firms in this case in the first and second administrative reviews. The most-adverse rate has been used only for those companies which did not respond at all, or responded in a substantially incomplete or defective manner. NPBS should be treated similarly to Uchiyama, which received a less-adverse BIA rate because both companies made substantial efforts to comply with the Department's requirements. If BIA is to be applied overall to NPBS, then the highest calculated rate for this review should be used.

Torrington argues that NPBS's reliance on the Department's treatment of Uchiyama and Asahi is misplaced. In determining BIA rates, the Department has taken into consideration whether a respondent has participated in an investigation or a review. During the first administrative review, NPBS and Asahi were treated similarly, and accorded less-adverse BIA rates, due in part to the fact that neither company had participated in the original investigation, and that each company had made efforts to comply with the Department's requirements. Uchiyama has been treated similarly in the current review, and awarded a less-adverse BIA rate. Uchiyama did not participate in the original investigation or the first review. Torrington also states that the Department can examine a respondent's degree of cooperation in past proceedings in its BIA determination. NPBS received a total BIA rate in the first review.

*Department's Position:* We have determined that the level of cooperation exhibited by NPBS during the course of this review is similar to that exhibited by Asahi and Uchiyama. Asahi was given a second-tier BIA rate in the first review, and NPBS and Uchiyama have been accorded second-tier BIA rates in this review.

*Comment 8:* Emerson contends that U.S. and international law permit the assessment of dumping duties up to, but not in excess of, the actual margin of

dumping. Emerson argues that since NPBS requested the review, and since it knew it would be verified, that it is not reasonable to expect that NPBS's actual dumping margin is greater than the rate assigned to it during the first administrative review, which was 45.83 percent. Therefore, a 106.61 percent margin would be unreasonable, and would not represent the most accurate dumping margin possible.

Torrington contends that Emerson's argument that a 106.61 percent margin is not a reasonable estimate of the actual dumping margin is inaccurate. Because the Department used a total BIA rate for NPBS in the first review, there is no verified, calculated dumping margin for NPBS on the record.

Emerson contends that Torrington's argument that the most-adverse BIA rate should be used in order to produce the most accurate dumping margin possible is in fact counter productive. The 106.61 percent rate is derived from information supplied by Torrington in the original investigation. The rate is not based on any of NPBS's or any other respondent's data, and is from a proceeding in which NPBS was not even a participant. Emerson contends that margins have decreased considerably from the original investigation, and that information from the investigation is not probative of current conditions.

*Department's Position:* As stated above in the Department's Position in Comment 6, we have determined that a second-tier BIA rate of 45.83 percent is appropriate for NPBS based on the level of cooperation exhibited during the course of the review.

*Comment 9:* Torrington contends that the Department was correct in rejecting NPBS's March 6, 1992 supplemental submission of HM data which NPBS states contained all required HM sales. Torrington states that the submission was untimely because it was submitted more than 180 days after initiation of the administrative review. Torrington argues that the cases in the past in which the Department accepted submissions after the 180 days were situations in which the corrections were minor and the Department could easily incorporate the new data in its analysis. Torrington contends that late submissions were accepted in situations where the Department requested the submission, or agreed in advance to a respondent's request to submit the data. NPBS admits that the Department did not request a new computer tape submission. The rejection of the submission was consistent with the Department's past practice of rejecting post-verification submissions of new information.

NPBS argues that the Department should accept its March 6, 1992 revised Section C computer tape, and calculate a margin based on this submitted information. Because the Section A response contained data on all HM sales, the data on the March 6, 1992 tape cannot be characterized as new, but is rather a reformatting of data which had been on the record since July 31, 1991. NPBS argues that the Department's rejection of this submission is contrary to Department policy and practice, because the Department in the past has accepted submissions beyond 180 days after initiation. NPBS states that the Section A data was available to the verification team and could have been verified.

NPBS contends that the only previously unreported information contained in the March 6, 1992 tape pertained to rebates for certain sales. Because this new information is so small in relation to the entire database, the Department should consider it timely.

NPBS argues that the Department routinely considers the date of publication of the preliminary results to be the deadline for submission of information, and therefore should accept this submission.

NPBS contends that the Department's regulations require it to request information determined critical to the review. If the information contained in the March 6, 1992 computer tape is deemed critical, then the Department must accept it. If the information is not deemed critical, then the use of a most-adverse BIA is inappropriate.

*Department Position:* The March 6, 1992 computer tape submission was correctly rejected because it was both untimely and unsolicited. A post-verification submission of 80 percent of HM sales constitutes a new response, not an amendment or correction of a previous, timely submission. After verification, neither the Department nor interested parties to the review had sufficient time to analyze new data. The Department did not request a new submission of the data because it was not able to establish, during verification, a basis for establishing at a later date, the veracity of any submitted sales information.

*Comment 10:* NPBS states that the statement that it failed to report all of its U.S. sales contained in the Department's March 19, 1992 memorandum is in error. NPBS states that the Department verified that NPBS reported all appropriate U.S. sales.

*Department's Position:* We agree with NPBS that all U.S. sales were reported.



The March 19, 1992 memorandum is in error, and has been amended.

**Comment 11:** Emerson argues that the Department's use of a two-tier system of applying BIA is not in accordance with the Administrative Procedure Act. If the Department wishes to issue a new rule regarding this two-tier methodology, it should provide for a formal opportunity for interested parties to comment. If the Department applies this methodology without following the proper procedures, it constitutes improper agency rule-making and cannot be lawfully applied in this case.

The use of a two-tier BIA methodology is inconsistent with the Department's past practice, which has been to base BIA on the higher of either the company's previous rate or the highest rate for a responding firm in the current review.

**Department's Position:** The use of a two-tier BIA system in the first and second AFB reviews does not constitute improper rule-making. The two-tier system is a guideline used for establishing, on a case-by-case basis, an appropriate BIA rate for respondents. Even if the two-tier guideline were a rule, it would be an interpretive rule not subject to APA requirements.

**Comment 12:** Emerson argues that if the Department chooses to apply the most-adverse BIA rate to NPBS, that rate should not be applied to Emerson's imports from NPBS. Emerson argues that as an importer which requested a review of its own imports, it should not be penalized by the imposition of a most-adverse BIA rate on NPBS. Emerson argues that the use of a 106.61 percent margin is punitive in effect, and is not an accurate estimation of the actual dumping margin. Emerson states that the Department has the authority to establish importer-specific rates, and contends that the Department should assess Emerson's entries at a less-adverse BIA rate.

Torrington states that Emerson is correct in noting that the Department has the authority to establish importer-specific assessment rates. Torrington states that it does not object to the establishment of importer-specific rates. However, in this instance, the Department cannot establish an importer-specific rate for Emerson, because NPBS's response has been rejected in favor of BIA.

**Department's Position:** We agree with Torrington. Although we normally would have calculated a specific assessment rate for Emerson, as an importer, this was not possible because of the deficiencies in NPBS's response. Emerson's entries will receive NPBS's BIA rate.

**Comment 13:** Torrington argues that as FAG-Germany refused to provide the Department with complete information on home market sales, particularly its failure to report sales related to military or other security purposes, and as FAG-Germany has presented no justification on the record to excuse its failure to report, the Department has no alternative but to reject FAG-Germany's entire home market sales response as inadequate and to use the best information otherwise available.

Torrington cites Section 776(c) of the Tariff Act to support the Department's use of BIA. Torrington argues that even if FAG-Germany were to report these sales at this time, the Department would not have time to verify this information and could not assume that the information was accurate or complete. Torrington cites the criteria of Section 773(a)(1)(A) as the basis for reporting sales on which foreign market value is to be based and asserts that if respondents believed certain sales did not meet these criteria, the burden was upon them to demonstrate the relevant facts. Torrington asserts that for each class or kind of merchandise, that information should be the higher of any rate found for FAG-Germany in the original investigation or the preceding review, or the highest rate found for any German company in this review.

FAG-Germany argues that it did not exclude sales to military departments from its home market data base, contrary to Torrington's assertion and contrary to a statement in the Department's verification report, which likely resulted from the misinterpretation by an FAG-Germany employee of a question posed by the Department at verification. FAG-Germany asserts that the Department can confirm that it did report home market military sales by looking at its customer numbers/names on its home market sales listing.

**Department's Position:** After a review of the record, the Department has determined that FAG-Germany did not exclude sales to military departments from its home market data base. The Department accepts FAG-Germany's characterization of the origin of this misunderstanding since FAG-Germany's submissions to the Department do include home market military sales. Therefore, resort to BIA is unwarranted.

**Comment 14:** INA-Germany points out that correction of the model designations in three of the nine BIA sales identified in the preliminary results will result in six ball bearing transactions involving a single model where FMV information was inadvertently omitted in its response.

INA-Germany argues that as INA-Germany has cooperated with the Department in this review and because the amount of data inadvertently omitted is extremely limited, resort to punitive BIA would be entirely unwarranted. INA-Germany asserts that BIA should be applied on a case-by-case basis and the proper rate should either be INA-Germany's rate for the class or kind of merchandise in the first review or the rate for the class or kind of merchandise calculated for INA-Germany in the current review.

Torrington states that the statute requires the Department to use BIA if a respondent fails to provide requested information, as INA-Germany has done. Torrington argues that to apply the rate found on other INA-Germany sales to this model would reward INA-Germany for its failure to report the home market models. Torrington asserts that the Department should follow its standard practice and apply the highest rate found for the same category of merchandise either by any German company during this review, or for INA-Germany during the first review or original investigation.

With regard to INA-Germany's failure to report home market data for a particular model exported to the U.S. and its proposal that the Department apply an average class-or-kind percentage dumping margin (either current or prior) to these transactions, Federal-Mogul argues that there is nothing in the record to support the presumption that INA-Germany's reporting failure pertained to an entirely representative (i.e., average) model and the Department should apply as BIA, the highest percentage dumping margin found for any INA-Germany transaction involving the same class or kind of merchandise. Federal-Mogul asserts that it would be imprudent for the Department to invite or encourage respondents to inadvertently fail to report data with respect to models in the future. Similarly, Federal-Mogul advocates application of the highest margin found for any transaction of a given respondent involving the same class or kind of merchandise where a respondent's failure to provide essential data necessitates the use of BIA for analysis of some, but not all, U.S. sales.

**Department's Position:** The results of the Department's analysis of INA-Germany's data are in accord with INA-Germany's assertion that following the correction of model designations of three of the nine ball bearing BIA sales identified in the preliminary results, six of these sales still remained where BIA was appropriate. However, the



Department disagrees with INA-Germany and Federal-Mogul as to the appropriate rate to be applied to these sales. While the Department is mindful of the possibility that a refusal to supply required information might in some instances be masked as an inadvertent failure to supply such information, the Department does not believe this is such a case. Therefore, in accordance with our standards for partial BIA discussed above, we have applied BIA to these sales based on INA-Germany's rate of 31.29 percent for ball bearings in the LTFV investigation.

*Comment 15:* P&WC argues that the Department should determine constructed value for several U.S. sales for which no identical or similar home market matches were found. Alternatively, P&WC argues that if the Department is unable to calculate constructed value for these sales, it should use as partial BIA the higher of (1) P&WC's rate for ball bearings as determined in the final results of the first administrative review, or (2) the weighted-average margin otherwise calculated for P&WC in the current review. P&WC argues that the Department should not use the "all others" rate determined in the LTFV investigation for its partial BIA in the current review, as this rate bears no relationship whatsoever to P&WC's sales and would be extremely punitive.

P&WC quotes the Tariff Act, Departmental regulations, and the final results of the first review to present the relevant standards for total BIA, particularly with regard to the importance of cooperating with the Department in a review. P&WC further quotes the final results of the first review for the Department's standard for partial BIA where a respondent cooperated but failed to supply complete data. P&WC asserts that it cooperated completely and fully in the current review, responded in detail and in a timely manner to all inquiries made by the Department, and in no way impeded the review. P&WC further asserts that it was unable to supply the requested CV data solely because it is a reseller with no access to the cost data of its suppliers, and further, the number of U.S. sales without matches was extremely small.

*Department's Position:* P&WC did not submit constructed value data for several models sold in the United States as requested by the Department. It is respondent's responsibility to provide a complete response; the Department is not required to reconstruct a response in instances where submitted data are inadequate. Therefore, in accordance

with our standards for partial BIA discussed above, we have applied BIA based on the "all others" rates listed above.

*Comment 16:* GMN states that for reasons set forth in its November 19, 1991 letter to the Department, GMN was unable to respond to Section E of the questionnaire for GMN bearings sold by GMA to its Whitton subsidiary and incorporated into spindles sold to unrelated U.S. customers. GMN argues that as its responses have been timely and thorough and as GMN has fully cooperated throughout this review as well as throughout the entire bearing proceeding, if the Department applies BIA to these bearings, it will only be applied to the value of the imported bearings incorporated in spindles sold during the six-week sample period.

*Department's Position:* The statute requires a respondent to report all further-processed sales in an administrative review. The Department advised GMN that if GMN failed to respond to Section E of the questionnaire, the Department would be required to determine the amount of antidumping duties applicable to the value of the imported parts that were further processed into finished bearings based on the best information available. The Department did not advise GMN that BIA would be limited to the imported parts sold during the six sample weeks. Therefore, we have applied GMN's rate of 35.43 percent from the LTFV investigation to all further processed imported parts sold during the POR.

*Comment 17:* Federal-Mogul argues that since SNR refused to provide necessary information concerning variable cost of manufacture for either U.S. or home market AFBs, without even a semblance of cooperation, the Department should assign to SNR a BIA rate which is "the highest rate for any company for the same class or kind of merchandise from the less than fair value \* \* \* investigation or prior administrative reviews" citing 57 FR 10859. Federal-Mogul states that it called the Department's attention to this omission in its COP allegation, which Federal-Mogul contends was wrongly rejected, and that while the Department failed to reiterate its requirement that SNR provide VCOM data for U.S. merchandise, the Department did reiterate this requirement for home market merchandise. Federal-Mogul asserts that SNR failed to correct its errors of omission and the Department ignored the omissions. Federal-Mogul states that as the computer listing indicates, the majority of margin

calculations require adjustment for differences in merchandise, and the Department's arbitrary creation of its own VCOM data fields into which it assigned values of zeros, has no relationship to reality. Federal-Mogul argues that the Department may not assume there are no differences in merchandise where the paired merchandise is not identical. Federal-Mogul concludes by insisting that if the Department persists in performing an analysis of SNR's submitted data, the Department should make changes to that data base and analysis as recommended by Federal-Mogul in its brief.

*Department's Position:* The Department agrees with Federal-Mogul that for purposes of the final results, values of zero should not be assigned to the VCOM fields for those models for which no cost information was supplied by SNR. Since SNR provided no data on which to base an amount for differences in merchandise, the Department used as BIA for difmer adjustments an amount equal to 20 percent of the weighted-average home market price less any selling, movement and packing expenses. We added this amount to FMV for any comparisons to similar merchandise (i.e., families) sold in the home market. Had SNR provided VCOM data for its U.S. sales, we would have used as BIA an amount equal to the difmer cap (20 percent of U.S. VCOM), which is the largest difmer adjustment we allowed for sales comparisons. See Comment 2 of Families and Model Match.

*Comment 18:* SNR explains that the U.S. sales with no matches were due to (1) keypunch errors, (2) models listed on the database with all sales (Section A), but not picked up on the home market database, (3) truncated family descriptions, (4) sales manufactured in Germany and incorrectly included, and (5) sales within the period of review, but not within the sample periods. SNR offers various suggestions on how the Department can find a suitable comparison for these unmatched sales.

Federal-Mogul rejects SNR's suggestion that we go beyond the sample period to obtain a home market match, stating that the integrity of the entire sampling process would be destroyed. Moreover, Federal-Mogul objects to SNR's belated attempt to correct its own alleged errors in tape creation, stating that this is an untimely attempt to add new factual information to the record. Federal-Mogul cites 19 CFR 353.31(a)(ii) in support of its position.



*Department's Position:* We agree with Federal-Mogul. It is the responsibility of the respondent initially to submit accurate and complete information. To make the numerous changes suggested by SNR places an unreasonable burden on the Department, does not follow the procedures established in this review (i.e., going outside the sample periods to find a match), and, in some instances, as Federal-Mogul states, constitutes the introduction of new information after the preliminary results. Therefore, for those sales where BIA is determined to be appropriate, we have applied, as BIA, SNR's rates of 56.50 percent for BBs and 18.37 percent for CRBs from the LTFV investigation.

*Comment 19:* RHP contends that the data from RHP and NSK-AKS Precision Ball Europe, Ltd. (NSK-UK) should not be collapsed as the Department has done for purposes of this administrative review. Nonetheless, RHP argues that the Department should continue to limit its application of BIA to U.S. sales by RHP of NSK-UK-produced bearings, and that given their extremely small percentage to RHP's total sales in the U.S. during the POR, the most appropriate source of BIA for these sales would be the weighted-average margin calculated on the remainder of RHP's sales in the U.S. RHP argues that to confirm the lack of any overlap between the product lines of the two companies, the Department should compare the data concerning NSK-UK-produced bearings in the company's January 31, 1992 supplemental response with the data concerning RHP-produced bearings in the company's original questionnaire response of October 22, 1991.

*Department's Position:* For purposes of these reviews, we determined RHP and NSK-UK are related and constitute a single respondent. Accordingly, we required all sales and pertinent cost information from these two entities. Neither ball bearing sales by NSK-UK nor its cost information were reported. However, RHP did provide sufficient product information and summary sales information to allow the Department to determine which margins on U.S. sales were potentially altered by the absence of required data. Therefore, we used BIA to determine the dumping margins on those affected U.S. sales. However, BIA will be limited to those U.S. sales whose foreign market value was affected by the absence of NSK-UK data as determined by computer analysis of RHP's data and indicated on the computer printout of the final results for RHP. Therefore, in accordance with the Department's policy for determining

partial BIA discussed above, we applied BIA to these sales based on RHP's rate for ball bearings of 44.12 percent from the LTFV investigation.

To determine which FMVs, and thus which margins on U.S. sales, were potentially affected, we used the model and family designations provided by RHP. We made no changes to these designations based on allegedly inaccurate product information in any of RHP's submissions.

*Comment 20:* Asahi states that because reported home market data in window months was dropped when the Department chose to annually average home market sales, and because no CV was originally reported for those sales that did have matching home market sales in a window month, the preliminary results identified those sales as lacking price or CV data and for which BIA would be used. Asahi argues that the reported sales in the window month should be included in the Department's calculation for the final results as they were reported in good-faith based on a reasonable understanding that they were contemporaneous within the meaning of the Department's questionnaire, and, as Section 773(a)(1)(A) of the Tariff Act indicates a preference for comparison of U.S. prices to actual home market prices over any other type of data, Asahi submits they are the correct home market comparisons. Asahi asserts that they are contemporaneous and were part of the home market sales verified by the Department.

Asahi next argues that if the Department determines not to use the window month sales in its analysis, it should use the CV data submitted with its brief. Asahi asserts that as it had no reason to believe it was necessary to supply CV information for these sales either in its original response or prior to issuance of the preliminary results and because this small amount of information for one model can easily be entered by the Department prior to the final results, although not submitted prior to the preliminary results, it should nonetheless be accepted.

Asahi finally argues that if the Department determines that BIA should be used, since Asahi made a good faith effort to comply with the Department's request, the appropriate BIA should be the sales data in the window month submitted by Asahi in its original response, as this is clearly the best information available since the Department successfully verified this information and it is within the Department's discretion to use this information. Asahi quotes Tapered

Roller Bearings and Parts Thereof from the People's Republic of China; Final Results of Antidumping Administrative Review. 56 FR 66, 67 (January 2, 1991), and Television Receivers, Monochrome and Color, from Japan, 56 FR 5392, 5399 (1991) to support its position that acceptance of this information is within the Department's discretion. Asahi cites to Preliminary Determination of Sales at Less Than Fair Value; High Information Content Flat Panel Displays and Subassemblies Thereof From Japan, 56 FR 7008, 7010 (February 21, 1991) as an instance where the Department found the weighted-average margin for sales with margins greater than zero to be the appropriate BIA for parties with substantially complete responses. Asahi finally argues that the Department should use the weighted-average margin for purchase price sales with margins greater than zero if the Department decides not to use Asahi's reported information.

*Department's Position:* Depending on the volume of sales, the Department required respondents to provide either sampled data for the 8 months listed in the questionnaire or all sales for the extended 17-month period. The Department requested constructed value information for any U.S. sale for which there was no contemporaneous home market sale of such or similar merchandise among a respondent's reported sales. Asahi provided information to the Department in accordance with the questionnaire instructions. However, because we used annual-average FMVs, some of Asahi's U.S. sales did not have home market or CV matches. Therefore, the Department will use the home market data from the window period supplied by Asahi in its initial submission.

*Comment 21:* Torrington claims that the Department's current margin program permits respondents to choose not to supply cost information for any given home market model, and thereby force comparisons of USP with CV. Torrington argues the program should be changed so that BIA will be applied to transactions where respondent's fail to provide cost information. Torrington asserts that failure to make such a change effectively will allow respondents to supply selected cost information and thereby determine which U.S. sales will be matched to CV.

Koyo asserts that there is no evidence that respondents deliberately fail to report cost information for purposes of forcing a price-to-CV comparison, and, therefore, Torrington's argument that the Department should amend its margin calculation program to use BIA rather



than CV to discourage such practice is specious.

Koyo argues that if the Department accepts Torrington's argument not to use CV, the most appropriate BIA, and the one the Department must use, is the average cost of the models grouped as one model according to the Department's model match methodology of which the particular model is a member.

**Department's Position:** The Department has made the necessary changes to the program to ensure that in those instances where cost information is not reported as requested, BIA will be applied. Koyo failed to provide COP information for certain models. We will use Koyo's reported data to the extent possible for calculating cost of production. However, where those models for which no COP information was provided are shown to be the most appropriate match for a U.S. sale, we have applied Koyo's rates of 73.55 percent for BBs and 51.21 percent for CRBs from the LTFV investigation as BIA. In addition, where any of these models belonged to a family which was used as a match, these BIA rates were applied to the family.

**Comment 22:** Torrington argues that for those U.S. sales where the Department did not find either a home market match or constructed value, and for which BIA is appropriate, it would not be correct to apply NTN-Japan's rate from the first review (14.23 percent) for ball bearings, but rather the rate from the LTFV investigation (21.36 percent) if that rate is higher than the NTN-Japan margin calculated in the final results of the current review.

**Department's Position:** The Department has amended its computer program which has eliminated the need to resort to BIA for any of NTN-Japan's sales. All U.S. sales were matched to either a home market sale or constructed value.

**Comment 23:** Honda argues that the Department should use the sales and price information submitted for the period May 1, 1990 through June 30, 1990 in its price-list response. Honda states that for the great majority of part numbers reported during this period, the computer tape prices were identical to the hard copy price lists submitted to the Department, and argues that the Department cannot use the best information available in lieu of the reported prices for these part numbers. Honda states that section 776(c) of the Tariff Act authorizes the use of BIA only when "a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or

otherwise significantly impedes an investigation." Honda also cites to 19 CFR 353.37 in support of this position. Honda further argues that the Department cannot apply BIA to information that is timely submitted and that is demonstrably correct by reference to information included in the administrative record. Citing to Final Results of Antidumping Duty Administrative Review; Certain Forged Steel Crankshafts from the United Kingdom, 56 FR 5975 (February 14, 1991), Honda asserts that the Department has withdrawn proposed use of BIA where a respondent confirmed the accuracy of data based on information that is part of the administrative record, and argues that the Department must use the price information because it was timely filed and demonstrably correct by reference to information already part of the administrative record.

Honda argues that the Department should use the computer tape information submitted for the remaining part numbers in the first reported period because the prices are the actual prices charged to Honda dealers during the period. Honda states that the discrepancies resulted from the fact that the hard copy price lists did not reflect price increases for certain part numbers that went into effect after the price lists were already published, and it was not practical to issue new price lists to reflect these increases alone. Honda asserts that it has confirmed that, with certain rare exceptions involving one or two part numbers, the computer tape prices were the actual prices charged to dealers. Honda further asserts that the inconsistencies affected a very small number of part numbers reported.

Honda asserts that the accuracy of the reported prices can be confirmed by reference to the sample invoices in an attachment to its case brief. Honda cites Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Italy; Final Results of Antidumping Duty Administrative Review, 57 FR 8295 (March 9, 1992) and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 FR 31692, 31741 (July 11, 1991) to support its position that the Department has allowed respondents to submit new data or corrections after issuance of the preliminary results. Honda argues that this case is stronger since no new data or corrections are being submitted, but rather "the accuracy of the basic data already part of the administrative record is being confirmed."

Honda states that its scheduled verification was canceled and as a result the issue of the hard copy price lists was not discovered until after issuance of the preliminary results, and asserts, that under these circumstances, the Department should not penalize Honda by rejecting accurate data that was submitted in a timely manner. Honda further asserts that, in light of the Department's own policy to resort to BIA only when a respondent is given an opportunity to correct deficiencies, the Department should not use BIA for these part numbers. Honda cites to the following cases as embracing such policy. Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico, 56 FR 1794, 1798 (January 17, 1991); Brass Sheet and Strip From Sweden; Final Results of Antidumping Duty Administrative Review, 55 FR 49317, 49319 (November 27, 1990). Honda asserts that it had no opportunity to confirm the accuracy of the reported prices to the Department before issuance of the preliminary results, because the Department did not notify Honda of the discrepancies between its price lists and the computer tape until after issuance of the preliminary results.

**Department's Position:** With the exception of the May-June 1990 period, Honda sold AFBs consistently in accordance with the prices in its price lists. Based on the clarification in Honda's case brief, which explains the discrepancies between the price lists and the computer tape for this period, we have determined to use the data on the computer tape in our margin analysis.

**Comment 24:** In its case brief for SKF-Italy and SKF-Sweden, citing to *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), reh'g denied (May 2, 1990), Torrington asserts that the Department has the duty to calculate the most accurate dumping margin possible and cannot base its decision on incomplete, untimely, or otherwise deficient information. Torrington asserts that the agency is under a statutory duty to use best information available when it has requested and failed to receive complete and timely responses in a proceeding. Citing to Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 FR 31692, 31705 (July 11, 1991), Torrington claims when resorting to BIA, the Department has applied different tiers depending on the adequacy of the record and degree of respondent's cooperation, and further



claims that partial BIA has been applied if the deficient portion of the response is not substantial.

Torrington argues that where the quantity of missing information is substantial, the Department should apply the most adverse, rather than a less adverse, partial BIA as it has done in the past. Torrington identifies the rate as the higher of: (1) The highest rate for the particular company from the LTFV investigation (or "all others" rates), or for any previous review, including a prior rate based on best information or (2) the highest calculated rate for any responding firm in the review period. Torrington cites to Antifriction Bearings, and Final Results of Administrative Review; Roller Chain, Other Than Bicycle, from Japan, 57 FR 6808, 6809 (February 28, 1992), in support of its position and argues that the Department should apply the most adverse data as BIA where SKF's data were missing, inadequate, or otherwise unverifiable.

*Department's Position:* See discussion of BIA rates above.

*Comment 25:* Torrington argues that the Department should apply an adverse partial BIA to those sales where SKF-Italy and SKF-UK failed to supply CV data for FMV sales as this will be consistent with the last review where an adverse BIA was applied for companies who failed to provide matching data for a significant portion of their reported U.S. sales by quantity.

Torrington asserts that, for those SKF-Sweden's sales transactions identified in the preliminary results for which no FMV was found, and for which the Department stated a BIA rate would be assigned, the Department should use the higher of the following two alternatives for those transactions: (1) The respondent's previous rate (or other "all others" rate, if the firm did not have an individual rate) from the LTFV investigation; or (2) the highest calculated rate for any firm in this or the previous review.

Torrington argues that, consistent with the Department's public disclosure memorandum, the Department should assign a BIA rate to those SKF-France U.S. sales for which no usable contemporaneous home market sale exists and for which no CV was found. Torrington asserts that, as in previous reviews where a company failed to provide matching data for a significant portion of its U.S. sales, the Department should use the higher of: (1) The respondent's previous rate (or the "all others" rate, if the firm did not have an individual rate) from the LTFV investigation; (2) the highest calculated rate for any firm in this or the previous review.

Federal-Mogul asserts that, as the need to resort to BIA for those SKF-Sweden ESP sales for which the Department found no price-based FMV and for which SKF failed to provide CV data, is solely a function of respondent's having failed to provide adequate data under their control, a BIA rate anything less than the highest margin found on any transaction involving the same class or kind of merchandise would be inappropriate and would reward respondents for withholding pertinent data and would encourage selective reporting in subsequent reviews.

SKF-France, SKF-UK, SKF-Italy and SKF-Sweden argue that for purposes of the final results, the Department should adjust its computer programming to capture accurately all costs reported by SKF and eliminate all references to the use of BIA, as SKF provided cost data for each and every product reported on its sales files and no cost data are missing.

SKF claims that, because the Department relied on the transaction code to match cost data to sales data, matches were missed or not found. SKF states that the transaction code was never expected or intended by SKF to be used for matching purposes since the transaction codes for its cost files reflect appropriate quarters whereas the codes in the sales file do not, and therefore, these codes cannot be used to create a bridge between the two files. SKF states that the Department should modify its computer program so that the date of sale is used to identify the quarter in which each sale took place and to match each sale to cost data provided for the relevant quarter, otherwise non-matches will occur when matches do in fact exist. SKF-UK further states that for a product sold in the home market in a particular quarter but not manufactured during that quarter, it is necessary to search previous quarters until cost information is found, and that failure to perform such a search will also result in an apparent lack of cost data. SKF-UK claims that if the Department corrects its programming to address these two problems, cost data will be found for all products and no BIA will be required. SKF-UK concludes by stating that any difficulty associated with locating appropriate cost matches cannot be attributed to a deficiency on the part of SKF-UK because SKF-UK's use of quarterly cost data was made with prior written notice to and approval by the Department. SKF-UK cites correspondence with the Department in support of this point.

SKF-Italy asserts that Torrington's argument for BIA for certain allegedly missing model match and U.S. sales

data is meritless and misleading and should be rejected as unmatched U.S. sales were due to a computer programming error, which when corrected, should result in no unmatched sales.

SKF-Sweden and SKF-France assert that Federal-Mogul's arguments concerning the treatment of alleged BIA transactions are moot, as SKF provided cost data for each and every product reported on its sales files, and thus no missing cost data exists. SKF argues that, because the Department matched cost data to sales data by partial reliance on the transaction code, the results yielded do not reflect this fact. SKF states that the transaction code is an internal identification system and was never expected to be used by the Department in the manner so used. While the cost file transaction codes reflect data on a quarterly basis, the codes in SKF's sales files do not, hence the transaction codes cannot be used to create a bridge between the sales and cost files. SKF asserts that the Department should modify the computer program so that the date of sale is used to identify the quarter in which each sale took place, and to match the sale to cost data for the same quarter, eliminating the need for the Department to resort to BIA.

*Department's Position:* As a result of certain computer programming input errors, we preliminarily determined that BIA was applicable for certain SKF sales. For purposes of the final results, we have corrected the input errors; the Department has assigned a calendar quarter to all cost and sales files based on the transaction codes and date of sale, respectively. We then matched COP to HM sales and CV, where appropriate, to U.S. sales based on the assigned quarters. This computer programming change obviated the need to resort to BIA for any of SKF's transactions.

*Comment 26:* Torrington argues that, due to a programming error, transactions for which there were no matches and no CV supplied by SKF-Italy (BIA transactions) are not included in the data base for which BIA is to be used for the final results of the review. Torrington asserts that this error should be corrected in the final determination.

*Department's Position:* For purposes of the final results, the Department has amended its computer program to apply the BIA margin to BIA sales.

*Comment 27:* Torrington identifies CV sales for which there are no reported margins due to an apparent mistake in SKF-UK's margin program calculation of margins for CV transactions and claims



that this programming error should be corrected for the final determination.

**Department's Position:** For purposes of the final results, the Department has amended its computer program to apply and include the BIA margin to BIA sales in the event that such BIA applications are warranted.

**Comment 28:** Torrington states that, although it urged the Department to conduct a thorough verification of all aspects of SKF-Sweden's questionnaire responses, particularly with regard to verification issues identified in Torrington's pre-verification letter, the Department did not conduct a verification, and, as these issues remain unresolved, the Department should be prepared to draw negative inferences and use appropriate BIA.

SKF-Sweden asserts that Torrington's claim that BIA is required absent verification with respect to warranty expenses and canceled U.S. sales lacks merit, as there is no requirement that the Department conduct verifications in every review. SKF further asserts that its sales listing is complete and accurate, and with regard to its warranty expenses, the Department examined and verified this expense in the investigation and first review and found it to be legally de minimis, hence, resort to BIA or further adjustment to the data is unnecessary.

**Department's Position:** Section 776(b)(3) of the Tariff Act provides that verification is required only if requested in a timely fashion by an interested party and if no verification was conducted during the two immediately preceding reviews and determinations, unless good cause exists to conduct a review. Although Torrington's request for verification was timely, verification was not mandated as SKF-Sweden was verified in the first review and no evidence was presented in the current review amounting to good cause. The Department is not prepared to draw negative inferences concerning SKF-Sweden's responses and to apply BIA, simply based on the fact that SKF-Sweden was not verified during this administrative review.

**Comment 29:** Federal-Mogul asserts that the Department's processing of SKF-Sweden's BIA sales for the preliminary results resulted in an understatement of SKF-Sweden's assessment and cash deposit rates because the Department did not include a margin on BIA sales. Furthermore, they recommend that the Department apply the highest recorded margin to these sales to be used in the subsequent calculation of assessment and cash deposit rates.

**Department's Position:** For purposes of the final results, the Department has amended its computer program to apply and include the BIA margin to BIA sales.

**Comment 30:** Yamaha argues that it provided the Department with evidence showing proof of payment for home market sales to both unrelated and related customers and that the Department decision memoranda on this issue are misleading and do not fairly characterize the results of verification. With regard to unrelated customers, Yamaha asserts that it spent considerable time at verification explaining the payment system, that Department staff reviewed the payment summary records, and that all available source documents were provided during verification, and, where not readily available, were provided to the Department later. With regard to related customers, Yamaha asserts that there is no formal "payment" system as would exist in a transaction with unrelated customers, and that the verification report states the obvious when it notes that these sales are eliminated upon consolidation.

Yamaha insists that the Department has ignored the following important points: that the Department's review of home market sales and underlying documentation confirmed that sales were based on a fixed percentage of the price list; that the Department reconciled total and monthly sales values and that this alone confirmed Yamaha's invoice prices; that the Department reconciled payment records for sales to the unrelated customers; and that Department staff discussed the consolidation of related-party sales with Yamaha accounting staff. Yamaha insists that it provided sufficient information to verify its sales and payment, and to the extent the verification report implies a review of the related-party consolidation did not take place, the report is simply wrong. Yamaha asserts that since the prices to related and unrelated parties were identical, it assumed the Department would follow its normal practice and allow the unrelated transactions to validate the related-party transactions, and has no reason to believe that the Department has or intends to abandon this policy. Yamaha asserts that at no point prior to verification did the Department indicate there was a problem with reporting sales to related companies. Yamaha states that it does not understand what more it could be expected to provide with respect to proof of payment, and argues that by suggesting that inability to show proof of payment for related-party transactions warrants use of BIA, the

Department is requiring Yamaha to provide documents that do not exist, something the Department does not have the authority to do. Yamaha cites to *Olympic Adhesive Inc. v. United States*, 899 F.2d 1565, 1588 (Fed. Cir. 1990) in support of this position.

**Department's Position:** Yamaha admitted that there is no formal "payment" system for home market sales to related customers and that such sales are eliminated upon consolidation. Therefore, the Department could not verify proof of payment. However, the Department is not deciding whether sales to consolidated subsidiaries cannot be used to form the basis of FMV, but rather has decided that in this case, Yamaha's reported transfers to its related subsidiaries cannot be used to form the basis of FMV, absent indication that home market sales were made at the appropriate level of trade. Simply because Yamaha had transfers of subject merchandise to related entities at a particular level of trade that occurred at amounts comparable to sales to unrelated entities at a particular level of trade does not validate its sales response.

The Department believes Yamaha misrepresented its distribution system to the Department, as well as failed to report home market sales at the appropriate level of trade. Yamaha Motor Co., Ltd. and Yamaha Motor Corp. U.S.A. requested an administrative review for the 1990-91 review period. Annual Reports for Yamaha Motor Co., Ltd., which only contained the consolidated financial statements for the company, were provided in its Section A response.

Also in its Section A response, respondent represented that it had two distribution systems for the home market and distributed AFBs in Japan through a number of related and unrelated distributors. Respondent stated that the only entity in the U.S. that imported AFBs subject to the review was YMUS, a related subsidiary that sold ball bearings to independent distributor/dealers. Later in the proceeding, the Department requested Yamaha to confirm that it had only unrelated distributor/dealers as a class of customer in the U.S. market. Yamaha responded that its "only class of customers in the U.S. are unrelated distributor/dealers." December 17, 1991, Supplemental Response at 2. Its additional references to its U.S. purchasers included " \* \* \* all sales to all dealers and distributors are based on \* \* \* " and " \* \* \* all dealers and distributors are eligible \* \* \* " and " \* \* \* YMUS's dealer/distributor price



is reflected \* \* \* *Id.* Together with other information on the record, these representations indicated to the Department that the categories distributor and dealers were synonymous or the same level of trade. In its supplemental response, Yamaha went on to state that with regard to its home market price lists, " \* \* \* the dealer/distributor prices are stated in yen" and "YMC sells to all dealers and distributors at prices that \* \* \* *Id.* at 3. For both markets, Yamaha represented that its dealers/distributors or distributors/dealers (its purchasers depending on the market) purchased at the same percentage of price list price in their particular markets, further indicating to the Department that only one level of trade existed in each market and that they were at least comparable levels. At no time prior to verification did Yamaha present the Department with information that would indicate that sales in the home market occurred at varying levels of trade. The Department had no reason to indicate to Yamaha prior to verification that there was a problem with reporting sales to the related companies in the home market because the Department was aware of no others and believed it had all the information it requested of respondent. Until verification, the Department proceeded under the belief that the extent of Yamaha's distribution systems were as depicted in its response. For the U.S., the distribution chain was depicted as: YMC-YMUS-Independent Distributor/Dealers. For the home market, the distribution chain was depicted as: YMC-Independent and Related Distributors. The Department had no reason to suspect that these were not comparable levels of trade. It was not until the Department attempted to verify Yamaha's submitted information that the Department was apprised of additional levels of trade in Yamaha Motor Co., Ltd.'s home market distribution network. These are identified in the Department's verification report. The Department believes that the comparable level of trade in the home market would be sales from Yamaha's sales offices to unrelated dealers. This would correspond to YMUS' sales to unrelated dealers in the U.S. This is particularly true since all of these entities are consolidated subsidiaries of Yamaha Motor Co., Ltd. Therefore, since Yamaha's home market sales submission is substantially incomplete, we have applied total BIA for these final results of review.

*Comment 31:* Yamaha argues that the Department erred in applying BIA information to Yamaha in this

administrative review. Yamaha states that contrary to the Department's verification report and decision memoranda, Yamaha reported all of its home market sales of bearings in its Section A response to the Department's questionnaire. Yamaha claims that if there is a problem with its response, it occurred when the company narrowed the home market data base from Section A during compilation of the Section B response, due to the confusing language of the questionnaire itself. Yamaha argues that the Department verified that Yamaha submitted all of its home market sales when it traced monthly profit and loss statements for the Parts Division into Yamaha's accounting records, that the information in Section A is completely adequate for the Department to calculate dumping margins under the price list option, and that Yamaha's reporting methodology had no material effect on the outcome. Yamaha asserts that the minute effect of such under-reporting in Section B does not warrant use of BIA against a respondent who reported all home market sales in Section A, and that the number of U.S. sales potentially affected is smaller than the 0.5 percent threshold deemed de minimis.

*Department's Position:* Yamaha concedes that it improperly reported its home market sales to the Department. Yamaha suggests however that the Department's questionnaire was unclear on this issue. The Department disagrees with Yamaha on this point. The questionnaire states: "If you sold bearings to the United States for which there were no identical bearings sold or offered for sale in the home market \* \* \* at the time of the U.S. sale(s), report HM \* \* \* data for all models in the same family as the model sold to the United States." Department's Section B/C Questionnaire at 8. In addition, the Department's questionnaire states that if respondents have any questions regarding the requirements, they should contact the Department for clarification. If Yamaha found the requirements to be unclear, then the burden was on Yamaha to ask the Department for guidance. The reporting requirements in the questionnaire were sufficiently clear to allow respondents to respond in the appropriate manner.

In addition, prior to verification, the Department had no indication that Yamaha had used an incorrect method of reporting its HM sales. Once the missing information was discovered, the Department was under no obligation to construct a new response. The fact that Yamaha is a price-list respondent and

fewer adjustments to sales data are required does not change this fact. This error in reporting, coupled with other errors and omissions identified with Yamaha's response, were sufficient grounds for the Department to conclude that Yamaha's response was unusable for purposes of calculating a dumping margin and resort to total BIA was necessary.

*Comment 32:* Yamaha argues that while it is methodologically problematic to derive a ratio based on invoice price and apply that ratio to list price, a disagreement over methodology is not a basis for using punitive BIA, especially when it can easily be changed. Yamaha asserts that there is complete information on the record to adopt an invoice based methodology, that the Department had more than sufficient information to disagree with Yamaha's methodology prior to verification, and that there is no justification for the use of BIA if the Department decides during verification to change the methodology.

*Department's Position:* The Department is permitted to weigh the cumulative effect of respondents' errors and omissions in assessing the integrity and reliability of a response. Yamaha reported its home market adjustments as a percentage of list price while the expenses were incurred on the basis of invoice price. Because reported sales in the home market were made at a percentage of list price, this methodology significantly overstated the home market expenses, thereby depressing home market prices. The Department is charged with calculating dumping margins as accurately as possible and is unable to fulfill this obligation with incomplete or inaccurate data. The Department believes that Yamaha's chosen methodology for applying home market expenses deviates too far from accepted Department practices as to warrant BIA.

*Comment 33:* Yamaha argues that the errors with respect to Yamaha's suppliers are trivial and in no way justify the use of BIA. Yamaha asserts that it provided the manufacturer of the bearings in question and did not interpret the use in the Department's questionnaire of the term "supplier" to mean seller, which could include non-manufacturers. Yamaha asserts that it is disingenuous for the Department to suggest that this represents a serious problem. Yamaha further asserts that with respect to the supposedly misstated acquisition costs, there is not a single example in the verification report where Yamaha understated the acquisition cost. Yamaha argues that in neither of the two situations where acquisition



costs are relevant (difmer and CV calculations) is the cost discrepancy a serious problem.

**Department's Position:** The Department disagrees with Yamaha that the errors identified with respect to its suppliers are trivial. In order to calculate accurate dumping margins, the Department must obtain complete and accurate information. The Department's Section A questionnaire under "Supplier Information" states: "If you were not the producer of all the subject merchandise, provide the names, addresses, and FAX numbers of all firms that supplied you with bearings you sold in the U.S. market during the review period." Section A Questionnaire at 2. The Department clearly asked for the names of suppliers and did not limit this request to suppliers who produced or "manufactured" the subject merchandise. Yamaha chose to limit its response to manufacturers and regardless of whether any adverse consequences resulted, this is a failure to respond accurately and completely to the Department's questionnaire, further affecting the integrity of its overall response. Similarly, even if the Department were to determine that the incorrectly reported acquisition costs could not distort its dumping analysis, it is another instance where the submitted information was less than reliable.

**Comment 34:** Yamaha argues that the other problems identified by the Department are either duplicative or trivial and do not justify the use of BIA, and in every instance the Department has complete information on the record to serve as the basis for revised methodologies. Yamaha argues that if the Department does not review a methodology until verification, there is no justification for the use of BIA if the Department decides to change the methodology during the verification. Yamaha asserts that although the denominators used for the various ratios include exchange gains and losses, the effect is negligible and, based on the monthly P&L supplied by Yamaha to the Department at verification, the Department can either include or exclude gains and losses. Yamaha further asserts that the Department can easily correct the inadvertent reporting of foreign inland freight as a home market expense by simply deleting it. Yamaha claims that other adjustments mentioned in the verification report and not appearing in its decisional memoranda, which were corrected and verified, do not warrant use of BIA.

**Department's Position:** The Department is permitted to weigh the cumulative effect of errors and

omissions in assessing the overall integrity and reliability of a response. While the Department does have the authority to make certain adjustments to respondent's data, at some point reconstruction of a response occurs. The Department believes that the cumulative effect of the adjustments that Yamaha suggests the Department should make amounts to such a reconstruction. Therefore, because Yamaha's response is unusable for purposes of conducting a fair-value analysis, total BIA is warranted.

**Comment 35:** Yamaha argues that the Department erred in applying a punitive BIA rate to Yamaha. Yamaha asserts that the Department does not have absolute discretion with respect to BIA and that its decisions must have a sound basis in the administrative record of a particular case and be consistent with prior administrative practice. Yamaha cites to the following cases in support of its position of a growing judicial willingness to correct abusive BIA decisions. *Olympic Adhesives Inc. v. United States*, 899 F.2d 1565, 1582 (Fed. Cir. 1990); *N.A.R. S.p.A. v. United States*, 741 F. Supp 936, 943 (CIT 1990). Yamaha argues that the decision to apply a punitive BIA rate to Yamaha is arbitrary and inconsistent with both the facts of this review and with prior Department practice. Yamaha asserts that unlike Minebea, Yamaha submitted questionnaire responses and unlike Nippon Pillow Block, Yamaha answered all of the Department's questions during verification and had no reason to expect, and does not deserve a punitive BIA rate of 106.61 percent.

Yamaha asserts that it has fully cooperated in this administrative review and that there is not a single document on the administrative record to indicate the contrary. Yamaha states that the Department developed a two-tier approach to BIA—punitive BIA for noncooperating companies and non-punitive BIA for cooperating companies—in the first administrative review and quotes language from the preliminary results in the current review as reflective of recent Department practice. Yamaha argues that punitive BIA is reserved for companies that do not cooperate with the investigation or administrative review and cites to the following cases as support for this position. Preliminary Results of Antidumping Duty Administrative Review; Tapered Roller Bearings (Other than Tapered Roller Bearings) and Part Thereof from France, 57 FR 10859, 10859-60 (March 31, 1992); Final Results of Antidumping Duty Administrative Review; Certain Iron Construction

Castings from the People's Republic of China, 57 FR 10644, 10646 (March 27, 1992); Color Television Receivers from Korea, 57 FR 7730, 7731 (March 4, 1992); Final Results of Antidumping Duty Administrative Review; Roller Chain, Other than Bicycle, from Japan, 57 FR 6808, 6809 (February 28, 1992).

Yamaha insists that the Department may disagree with some of Yamaha's methodologies, but that such disagreements do not transform Yamaha into an uncooperative party or impede the proceeding.

Yamaha argues that even if a company has serious deficiencies in its response, the Department will still find the company to be cooperative and use non-punitive BIA. Yamaha cites to the following cases to support this position. Final Results of Antidumping Duty Administrative Review; Roller Chain, Other than Bicycle, from Japan, 57 FR 6808 (February 28, 1992); Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof from Japan, 56 FR 65228 (Dec. 16, 1991).

Yamaha further argues that even where a response is largely unusable, the Department does not use the punitive BIA against cooperating firms. Yamaha notes the Department's treatment of Isuzu in Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof from Japan, 56 FR 65228 (Dec. 16, 1991) as illustrative of the inappropriateness of the rate applied to Yamaha in this review, as Isuzu failed to report 60 percent of its home market sales and received a non-punitive BIA, whereas Yamaha left off approximately 7 percent of its home market sales in its Section B sales listing.

Yamaha argues that before invoking punitive BIA the Department requires extreme non-cooperation, citing Portable Electric Typewriters from Japan, 56 FR 56393, 56394 (November 4, 1991) in support of this position.

Yamaha argues that even after announcing its new BIA policy in the final results of the first AFB review in July 1991, the Department sometimes applied non-punitive BIA to non-cooperating companies who refused to provide any response at all. Yamaha cites to the following cases in support of this position. Final Results of Antidumping Duty Administrative Review; Color Television Receivers, Except for Video Monitors, From Taiwan, 56 FR 65218, 65227 (Dec. 16, 1991); Final Results of Antidumping



Duty Administrative Review; Roller Chain From Japan, 56 FR 32175, 32176 (July 15, 1991). Yamaha asserts that these recent decisions of the Department demonstrate that punitive BIA is an extreme sanction used only for almost total non-cooperation and that companies with problems more serious than those alleged for Yamaha have received non-punitive BIA rates, therefore, there is no basis that can rationalize treating Yamaha so harshly.

Yamaha argues that the 106.61 percent rate has no relationship either to Yamaha or to this period of review and that there is no conceivable circumstance under which it could be considered appropriate BIA. Yamaha states that this rate comes from a different company, it is significantly out of date, that it never represented anything other than a BIA rate and it is not even based on actual data from a Japanese company, all which undermine its reliability. Yamaha asserts that the calculated ball bearing rates from either the first review or the preliminary results would be more accurate than the 106.61 percent BIA rate from the original investigation as it has no relationship to reality. Yamaha asserts that in this case the Department has a variety of other more probative margins to use as BIA, a situation fundamentally different from *Rhone Poulenc v. United States*, 899 F.2d 1185 (Fed. Cir. 1990), where Yamaha claims the Department only had the Rhone Poulenc rate from the investigation, since its rates in the first and second reviews had been zero. Yamaha claims that Torrington presents an over-broad reading of *Rhone Poulenc*, when it asserts that the case stands for the proposition that the highest rate is presumptively the best information. Further, Yamaha argues that its situation is factually different since the Department has a number of alternatives to use as BIA, and that there is no evidence on the record to allow the Department to conclude 106.61 percent is the best information for dumping by a cooperative company, whereas there is evidence that 106.61 percent is not the best information and can only be viewed as a punishment.

Yamaha argues that if BIA were justified, the most appropriate rate would be the highest rate for a responding Japanese firm in this review, which should only be applied to those U.S. models that could possibly have been affected by Yamaha's reporting methodology. Yamaha claims that this type of partial BIA has been applied by the Department in the past, citing Final Results of Antidumping Duty Administrative Review; Antifriction

Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 56 FR 31692, 31705 (July 11, 1991) in support of this position.

Yamaha finally argues that applying punitive BIA to Yamaha in this review is particularly unfair as the non-cooperative BIA is especially punitive since the gap between the punitive and nonpunitive rates is enormous and because other companies in this review provided far less information to the Department, yet received more favorable treatment.

Yamaha asserts that it is perverse to suggest that companies which submit detailed responses and undergo verification should be treated more harshly than companies that provide no information.

Federal-Mogul argues that as the record establishes that Yamaha's sales to related parties could not be verified, that it failed to report all required home market sales and reported adjustments as a percent of list price when in fact they were incurred as a percent of sales price, the Department is justified in its application of a first-tier BIA rate to Yamaha.

*Department's Position:* Although Yamaha provided some information, the quality of this information was not sufficient or adequate to form a basis to calculate foreign market value. Therefore, we have relied exclusively upon BIA to determine Yamaha's dumping margin. Nevertheless, because Yamaha attempted to cooperate and submitted some information, we applied the second-tier BIA as described above. As Yamaha requested an administrative review, provided the Department with questionnaire responses, and submitted to verification of its response, the Department agrees that a first-tier BIA rate is not warranted.

#### 9. Level of Trade

*Comment 1:* NWG reported that its sales fall into four different levels of trade: original equipment manufacturers (OEMs), distributors, trading companies/wholesalers, and end-users. The Department collapsed these four levels into two, but made no level-of-trade adjustments in circumstances where NWG's previously defined levels of trade were crossed. NWG contends that the four levels of trade should not have been collapsed into two, and that adjustments should have been made where the initial levels of trade were crossed.

Federal-Mogul counters that the Department's treatment of NWG's four levels is consistent with how it has treated all other respondents in these

reviews, and that such treatment for NWG is logical because NWG's four levels collapse into two meaningful levels. Federal-Mogul notes that by collapsing NWG's four levels, there is a practical advantage of maintaining consistency with other companies that have more diverse levels which were also collapsed into two levels.

*Department's Position:* Under section 773(a)(4)(B) of the Tariff Act, if it is established to the satisfaction of the Department that the amount of any difference between USP or FMV is wholly or partly due to differences in circumstances of sale, due allowance will be made therefor. However, it is the respondent's responsibility to request such an adjustment, to demonstrate that such an adjustment is justified, and to appropriately quantify the adjustment. Final Determination of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof, from the Federal Republic of Germany, 54 FR 18992 (May 3, 1989). See also 19 CFR 353.56 and 19 CFR 353.58. NWG did not provide evidence to confirm distinctions between certain reported levels of trade. Where we could not determine that there were actual differences, the reported levels of trade were collapsed. In one case, NWG attempts to draw a distinction between OEMs and end-users by suggesting that the Department recognize differences in the identity of NWG's customers' customers. However, the Department is concerned with the level-of-trade at which sales are made to the first unrelated customer. NWG has not demonstrated the particular relevance of the resale of the merchandise to the Department's level-of-trade analysis in this review.

Regarding NWG's request that adjustments be made where we crossed levels of trade, we find that respondent failed to provide adequate information to make such an adjustment.

*Comment 2:* NTN-Japan's sales were made at three levels of trade: OEM's, distributors, and aftermarket. For the preliminary results, the Department crossed levels of trade. NTN argues that the Department should have either not crossed levels of trade, and then made comparisons to CV, or should have made a level-of-trade adjustment when levels of trade were crossed. Such an adjustment should be based on, preferably, differences in selling prices at the different levels of trade, or else on the difference in indirect selling expenses.

*Department's Position:* Our review of the statute, our administrative practice, and judicial precedent lead us to



conclude that we cannot resort to CV simply because the only existing sales in the foreign market are at a different level of trade than the export sale. The regulations neither authorize nor require the Department to resort to CV as a result of level of trade differences. 19 CFR 353.58 provides that, where possible, the Department will compare sales at the same level of trade. But "(i)f sales at the same level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate FMV based on sales of such or similar merchandise at the most comparable commercial level of trade." The Secretary may then make appropriate adjustments for level of trade differences affecting price comparability. The Department has consistently determined in past reviews that the fact that home market sales may be at a different level of trade does not outweigh the importance of relying on actual sale prices rather than CV. Final Results of Antidumping Duty Administrative Review; Brass Sheet and Strip from Canada, 55 FR 31414 (1990); Final Results of Antidumping Duty Administrative Review; Brass Sheet and Strip from Canada, 55 FR 30701 (1987); Final Determination of Sales at Less Than Fair Value; Fresh Cut Flowers from Costa Rica, 52 FR 6582 (1987). The CIT has affirmed this approach. *NTN Bearing Corp. of America v. United States*, 747 F. Supp. 726, 743 (CIT 1990); *Timken Co. v. United States*, 11 CIT 786, 674 F. Supp. 495 (CIT 1987).

With respect to NTN's request that a level-of-trade adjustment be made when levels of trade are crossed, NTN quantified indirect selling expenses incurred at different levels of trade. Therefore, in comparisons made across levels of trade, we have accepted the differences in these expenses as attributable to level-of-trade, and we have granted an adjustment accordingly.

**Comment 3:** Federal-Mogul contends that it was improper for the Department to have allowed P&WC the level-of-trade adjustment to FMV that it had requested for most of its home market sales. P&WC had explained that all of its purchase price sales were made to distributors and that, for all distributor sales, it had offered a special discount. This discount only applied to sales at this level-of-trade. P&WC contended that the discount offer was necessary because of additional costs incurred by the customers, which were due to the nature of their operations and their sales function. These customers were distributors involved in the operation of "overhaul and repair facilities needed to

service engines and install the AFBs (into the engines)."

Federal-Mogul claims that, generally, the "basis of and justification for adjustments" is "differences in costs to the respondent." Since it was the customer that incurred the additional costs, not P&WC, the discounts have no bearing on the market value of the merchandise. Therefore, the discounts are essentially a pricing practice, and are not related to P&WC's own costs.

**Department's Position:** We disagree with Federal-Mogul. 19 CFR 353.58 directs us to compare sales at different levels of trade when sales at the same commercial level are insufficient, and to make appropriate adjustments for differences that affect "price comparability" across levels. During the period of review, P&WC sold only to two levels in the U.S.: operators (ESP sales) and distributors (PP sales). In the home market, sales were made to these same two levels, but few sales were made at the distributor level. For the majority of PP sales, this lack of home market distributor-level sales precluded the possibility of making same-level price comparisons in family situations. Therefore, it was necessary to examine home market sales at the operator level.

To account for the price difference resulting from level-of-trade differences, an adjustment was made based on the discounts offered at the distributor level. P&WC provided detailed cost data from its customer, an unrelated distributor, demonstrating the expenses being assumed at the distributor level and the need for P&WC to grant a discount. From the data provided by P&WC, the relationship between these expenses and P&WC's discount is apparent. It follows that when P&WC, which also was involved in engine overhaul and repair work, made sales to customers who performed this work in P&WC's stead, P&WC was able to avoid incurring the associated costs. Because the distributors were able to assume some of the installation costs on behalf of P&WC, the respondent's total costs were lower, which justified the distributor's discount and the lower price offered by P&WC to distributors. In *Silver Reed v. United States*, the Department indicated its willingness to consider, for purposes of quantifying the level-of-trade adjustment, information that demonstrates "that the expenses of an unrelated distributor, selling merchandise of the same class or kind and produced by a different manufacturer, closely approximate those of a related distributor." 711 F. Supp. (CIT 1989), at 630 n.2.

In that same case, the Department also indicated its willingness to consider, for purposes of quantifying the level-of-trade adjustment, sales in the HM which are not sufficient in quantity to be used for price comparison. *Id.* P&WC was able to quantify its level-of-trade adjustment in such a manner. As noted above, sales of similar merchandise at the distributor level in the home market were not sufficient in quantity for making family comparisons. These sales, however, featured the same discount schedule that was in place for sales to distributors in the United States. It was solely on the basis of these discounts that level-of-trade adjustments were made. P&WC was able to demonstrate, to our satisfaction, that this discount was necessary for this particular class of customer, and that it was consistently granted to all U.S. and home market distributors. Therefore, we are satisfied that there are cost differences at different levels of trade which affect price comparability across levels.

#### 10. Related-Party Sales

**Comment 1:** Torrington states that for purposes of the preliminary results, Koyo's related-party sales of ball bearings were determined to be arm's-length transactions, while its related-party sales of cylindrical roller bearings (CRBs) were not, and were therefore not included in our analysis. Torrington points out that in prior proceedings, Koyo's sales to a major shareholder were disregarded, as they were considered "transfers between related parties and not at arm's length." (See Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof. Finished and Unfinished, from Japan, 52 FR 30700, 30707 (August 17, 1987). Torrington argues that in this review, if the Department determines that this major shareholder and Koyo are related, and that the prices charged were inconsistent with those charged to arm's-length purchasers, the Department should not simply reject the reported prices, but should instead utilize the major shareholder's resale prices for comparison purposes.

Koyo argues that the Department has already conducted an analysis of Koyo's sales and concluded that these sales were at arm's length, and that in the absence of evidence to the contrary, it is unnecessary for the Department to repeat this exercise. Koyo asserts that Torrington has introduced no evidence to suggest that Koyo's ball bearing sales to this related party were not arm's-length transactions. Koyo further argues



that the Department's treatment of sales between Koyo and this purchaser in a previous review in a different antidumping proceeding is of no relevance in this review.

**Department's Position:** For purposes of the preliminary results, the Department performed an arm's-length test on Koyo's sales data, including sales to this major shareholder, and was satisfied that the sales prices of ball bearings to related parties were comparable to the prices at which Koyo sold the same merchandise to unrelated parties. For the preliminary results, we determined that sales of cylindrical roller bearings were not made at arm's length and excluded them from our analysis. We treated Koyo's related-party sales in the same manner for the final results.

**Comment 2:** Nachi states that it inadvertently included some related-party sales in its home market database. Nachi argues that these sales should be excluded from foreign market value since the number of these sales is extremely small and because it has not been shown that these sales were made at arm's length as required by 19 CFR 353.45(a) before inclusion of such sales in calculating foreign market value.

Torrington argues that the Department should reject Nachi's request to exclude related-party sales from its home market database, or at a minimum, the Department should require Nachi to demonstrate that these transactions were in fact not made at arm's length before they can be excluded. Torrington asserts that to permit respondent to critique the preliminary results, and to exclude or withdraw factual information with the aim of reducing or eliminating antidumping liability is contrary to the statute and the regulations.

**Department's Position:** The Department performed an arm's-length test on Nachi's home market sales database and determined that the related-party sales in question, involving both ball and cylindrical roller bearings, were made at prices comparable to those to unrelated customers. The fact that the number of these sales is extremely small is irrelevant.

**Comment 3:** Torrington argues that the Department's decision not to require FAG-Germany to report sales or cost information for a group of bearing manufacturers, formerly known as DKF, acquired by FAG-Germany during the POR and located in the territory of the former German Democratic Republic (GDR) represents a major departure from the agency's normal practice. This decision was based upon representations by FAG-Germany that during the POR no bearings made by

these former GDR manufacturers were sold in the U.S., that all such bearings sold in Germany were sold under the DKF name, and that all sales data for FAG-Germany and the former GDR manufacturers were segregated. Torrington claims this is strikingly different from the Department's actions in Solid Urea from the German Democratic Republic, 57 FR 5130 (February 12, 1992), where the Department initiated a separate review to determine whether the antidumping duty order covering solid urea from the former GDR applied to shipments from the pre-unification Germany as well. Torrington states that rather than initiate a separate review to determine whether the order should cover eastern German bearings, the Department decided that no investigation was necessary based on the representations of the company. Torrington argues that such an approach is defensible only if the Department verified the assumptions upon which its decision was based, and, at the least, should require FAG-Germany to submit verification-type information regarding DKF before reaching a final determination. Finally, Torrington argues, should FAG-Germany fail to provide this information, the Department should use BIA as the basis for the final results.

FAG-Germany argues that the Department's handling of the antidumping duty order covering Solid Urea From The German Democratic Republic, bears no relation whatsoever to the DKF situation. FAG-Germany claims the changed circumstances review in Solid Urea was initiated to determine whether the order covered shipments from the pre-unification territory of Germany at all, where shipments were being made to the U.S. and those shipments were excepted from deposit requirements by Departmental directive. FAG-Germany claims that in addition, the fact that the order was promulgated against a non-market economy country raises serious and different coverage questions from those present in this case. FAG-Germany asserts that although no verification of DKF data was required by statute or regulation, the Department's verification at FAG-Germany's headquarters found no intermingling of sales or costs between FAG-Germany and DKF and no evidence that FAG-Germany sold any DKF bearings during the POR.

**Department's Position:** The Department's usual practice is to collapse related parties if the nature of their relationship allows the possibility of price and cost manipulation. As we explained in our memorandum of

September 20, 1991, given the extraordinary circumstances surrounding FAG-Germany's DKF acquisition, and because we believed that there was little likelihood of price and cost manipulation during the POR, the Department decided not to collapse these two related firms and require the reporting of DKF's home market sales and cost data for the 1990/91 review period. In addition, because there was no evidence that DKF made any transition from a non-market economy structure to a market-oriented structure during the POR, requiring consolidated information would not have reflected the structures of either organization. As the Department explained in its memorandum, this transition period was granted to provide FAG-Germany a reasonable period of time to convert DKF's records and business practices to reflect its new economic environment. The Department notes that if there was any evidence that FAG-Germany had not adhered to any of the conditions accepted by it in order to obtain the grant of a transition period, including the condition that FAG-Germany not sell DKF-produced bearings in the U.S., it would have been noted in the Department's verification report.

The Department's decision to initiate a review in Solid Urea is not relevant to this determination. The issue is not whether bearings manufactured by former GDR firms, if sold to the United States, are subject to these antidumping duty orders. The question is whether sales and cost information of the former GDR firms newly acquired by FAG-Germany should be included in FAG-Germany's questionnaire response. For the reasons stated above, we determined that it was appropriate not to require this information. This decision was not based on assumptions but on facts generally known and facts presented by FAG-Germany, such as the fact that the two companies maintained separate accounting, marketing and sales operations, the fact that the production facilities within each company did not share the same type of equipment, and the fact that the acquisition did not occur until nearly seven months into the twelve-month review period. Furthermore, the Department was not obligated to verify this information, though we did verify FAG-Germany's sales information. Although we did not visit the facilities of the former GDR manufacturers as part of our verification of FAG-Germany, we found no information which contradicted the information on which this decision was based.



*Comment 4:* Torrington argues that, in this review, it is not adequate for SKF-Sweden to rely on information from the investigation and the first review to support its contention that its relationship with its related supplier Ovako is arm's-length in nature, because this is a separate proceeding. Torrington argues that verification would have allowed the Department to compare purchases of steel from related and unrelated suppliers and that under the circumstances, for all purchases from Ovako, the Department should apply a BIA value of the price paid to unrelated suppliers for the same or comparable steel.

*Department's Position:* Section 776(b)(3) of the Tariff Act provides that verification is required only if requested in a timely fashion by an interested party and if no verification was conducted during the two immediately preceding reviews and determinations, unless good cause exists to conduct a verification. Although Torrington's request for verification was timely, verification was not mandated as SKF-Sweden was verified in the first review and no evidence was presented in the current review amounting to "good cause." As the arm's-length nature of transactions between Ovako and SKF-Sweden was verified in the investigation and because there is no evidence on the record disputing this prior determination, the Department will continue to treat such transactions as arm's length in nature.

#### 11. Samples, Prototypes, and Ordinary Course of Trade

*Comment 1:* Torrington argues that FAG-Germany has not provided sufficient evidence on the record to qualify its claimed sample and prototype sales as outside the ordinary course of trade. Specifically, Torrington contends that FAG-Germany has not demonstrated that the sales were made in unusually small quantities or at unusually high prices.

*Department's Position:* We agree that FAG-Germany has not provided sufficient evidence to justify exclusion of its sample and prototype sales. Therefore, all home market sales have been included in the final margin calculation.

*Comment 2:* NTN-Germany argues that its sample sales and sales of small quantities are outside the ordinary course of trade and should be excluded from the home market data base.

*Department's Position:* NTN-Germany has failed to identify any sample sales or sales outside the ordinary course of trade in its home market sales listing. Therefore, we did not exclude any home

market sales as being outside the ordinary course of trade.

*Comment 3:* SKF-Germany argues that its sales of samples, prototypes, and obsolete products in the home market should be eliminated from the home market data base because they are sales made outside the ordinary course of trade. SKF-Germany alleges that these sales of small quantities of merchandise at prices substantially higher than the prices of most home market sales should be excluded for price comparison purposes. Torrington contends that the Department could not verify that the models claimed as "obsolete" (e.g., those models not produced in Germany after January 1, 1987) were not being produced by SKF in companies outside of Germany. In addition, Torrington points out that, while SKF-Germany classified a model as a prototype if it was sold in a trial sale, the Department was unable to confirm that these models had not been produced previously in other SKF facilities. Finally, Torrington argues that SKF-Germany was not able to demonstrate that its claimed sample sales were made outside the ordinary course of trade.

*Department's Position:* There is insufficient evidence on the record to indicate that sales claimed by SKF-Germany as outside the ordinary course of trade should be excluded from the final margin calculations. During verification, SKF-Germany was unable to substantiate its claim for obsolete, prototype and sample sales. See Department of Commerce Verification Report for SKF-Germany, March 3, 1992, at 10; See also, Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 56 FR 31713 (July 11, 1991).

*Comment 4:* SNR contends that zero price sales of prototypes in the U.S. should be excluded from the final margin calculations. Federal-Mogul argues that the only U.S. sales which can be excluded from analysis are those that do not fall within a specific sampled period. Final Results of Antidumping Duty Administrative Review; Television Receivers, Monochrome and Color, From Japan, 56 FR 38417, 38421 (August 13, 1991). Federal-Mogul contends that any U.S. sales which fall within a sample period must be analyzed.

*Department's Position:* The statute and the regulations require the Department to analyze all sales within the period of review. Final Results of Antidumping Duty Administrative Review; Color Television Receivers From the Republic of Korea, 56 FR 12709

(March 27, 1991); Final Results of Antidumping Duty Administrative Review; Brass Sheet and Strip From Canada, 55 FR 31417 (August 2, 1990); Final Results of Antidumping Duty Administrative Review; Portable Electric Typewriters from Japan, 56 FR 124079 (April 5, 1991). SNR has failed to provide information regarding these sales which would demonstrate that these transactions should be excluded from the final margin calculations.

*Comment 5:* NSK argues that home market sales of samples and prototypes should be excluded from the final margin analysis. NSK claims that it has provided sufficient evidence to reflect that these sales are unusual in nature due to their significantly higher prices (than similar merchandise). While Torrington agrees that NSK's information reflected that the specific sales under consideration were, indeed, prototype sales, Torrington argues that the Department should not assume that all sales classified as prototypes or samples were outside the ordinary course of trade based on the information submitted regarding a few prototype models. Torrington argues that the Department should grant exclusion only to those prototypes specifically profiled by NSK in its various submissions, but not to all claimed prototype and sample sales. Federal-Mogul argues that the Department cannot consider sales to be sample sales simply based on low quantities with high prices.

*Department's Position:* NSK has provided ample information documenting the nature of its prototype and sample sales and has provided extensive data and price history information regarding some of its prototypes and samples. As Torrington agrees, NSK's data reflect that these sales were of prototypes outside the ordinary course of trade. It would be unreasonable to require information on every specific bearing in order to allow its exclusion as outside the ordinary course of trade. See *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983). Home market sales of NSK's samples and prototypes have been excluded from the home market data base for the purposes of the final margin calculation.

*Comment 6:* Torrington argues that NSK's zero price sample sales in the U.S. were properly included in the margin calculation. NSK contends that such transactions do not meet the legal definition of a sale, and so must not be included in the analysis. NSK cites section 773(a)(4)(A) of the Tariff Act, which refers to the commercial quantities for foreign market value in its



argument that a zero price sale in the U.S. should be disregarded, as it is outside the ordinary course of trade. NSK also references Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 56 FR 26054, 26059 (June 6, 1991), where zero price sample sales were disregarded because there was a line item for sample sales in the indirect expenses.

*Department's Position:* We disagree with NSK for the reasons set forth below. As in Final Results of Antidumping Duty Administrative Review; Color Television Receivers from Korea, 53 FR 24978 (July 1, 1988) and Final Results of Antidumping Duty Administrative Review; Television Receivers, Monochrome and Color, from Japan, 52 FR 8941 (March 20, 1987), goods entered for consumption are subject to an antidumping duty order wherever ownership transfers from the exporter of the goods to an unrelated U.S. purchaser. Sample sales, however, fall outside the scope of the review when the respondent can demonstrate that no transfer of ownership has occurred between the exporter and the unrelated U.S. purchaser. *Id.* Nothing on record here demonstrates that NSK maintains exclusive ownership of the subject merchandise after exportation to the U.S. NSK's reference to section 773(a)(4)(A) in its argument to exclude U.S. zero price sales is also inaccurate, as this section of the statute refers specifically to adjustments to foreign market value, and not U.S. price. Furthermore, at verification of NSK's ESP sales, it was determined that the line item for samples covered only the incidental expenses in delivering and packaging the sample, not the actual cost of the sample itself. Department of Commerce Verification Report for NSK, March 17, 1992, at 8. Finally, the statute and the regulations require the Department to analyze all sales within the period of review. Final Results of Antidumping Administrative Review; Color Television Receivers From the Republic of Korea, 56 FR 12709 (March 27, 1991); Final Results of Antidumping Duty Administrative Review; Brass Sheet and Strip From Canada, 55 FR 31417 (August 2, 1990); Final Results of Antidumping Duty Administrative Review; Portable Electric Typewriters from Japan, 56 FR 124079 (April 5, 1991). Consequently, all U.S. zero price sales have been included for the final margin calculation. See Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts

Thereof from the Federal Republic of Germany, 56 FR 31713 (July 11, 1991); Final Determination of Sales at Less Than Fair Value; Certain Fresh Cut Flowers from Colombia, 52 FR 6847 (March 5, 1987).

*Comment 7:* NTN-Japan argues that sample sales should not be included in the FMV for purposes of the final margin calculation. NTN-Japan also argues that its sales in the home market where the quantity sold is less than five units per month should also be excluded as outside the ordinary course of trade. NTN-Japan cites Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan, 57 FR 4960 (February 11, 1992), where such sales were excluded based on the fact that the exclusion of the sales would not meaningfully affect the results of review. Torrington argues that NTN-Japan has submitted no information on the record which would substantiate its claim that sample sales and sales outside the ordinary course of trade should be excluded from FMV. Torrington points out that, if the final margin calculation in the Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan, 57 FR 4960 (February 11, 1992) was not meaningfully affected by the exclusion of the alleged sample sales and sales outside the ordinary course of trade, there would be no harm in including them in the analysis at hand, especially in light of the fact that NTN-Japan has not provided even minimal proof to support their claims. Torrington further argues that many bearings are sold in very limited quantities, and NTN-Japan cannot unilaterally decide that sales of certain limited quantities are outside the ordinary course of trade.

*Department's Position:* NTN-Japan provided insufficient evidence in its October 15, 1991 submission to substantiate its claim that sales of sample and small quantities constitute sales made outside the ordinary course of trade. Furthermore, as in Final Results of Antidumping Duty Administrative Review; Portable Electric Typewriters from Japan, 56 FR 14072 (April 5, 1991), small quantity home market sales are not, in and of themselves, indicative of sales not made in the usual commercial quantities and/or sales outside the ordinary course of trade. See Final Determination of Sales at Less Than Fair Value; Certain Steel Pails from Mexico, 55 FR 12247 (April 2, 1990). These sales have been included in the final margin calculations.

*Comment 8:* Nachi argues that sales of a certain model were made outside the ordinary course of trade. Nachi refers to Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 57 FR 4979, 4980 (February 11, 1992), where NSK successfully showed that a single home market sale of a model was outside the ordinary course of trade because (a) the bearing was intended for the U.S. market and (b) there was only one other home market sale of that model since 1974. Nachi claims that the facts surrounding its single home market sale (during the sample period) of a certain model are similar to the facts in the TRB case. Nachi claims that its nomenclature reflects that it is a special design and was built exclusively for a large U.S. customer. Nachi then goes on to say that, although this product was designed exclusively for one customer, it was sold to at least two U.S. customers. Nachi points out that only one unit of the model was sold in the home market during the period of review and, since 1984, only five sales have been made in the home market. Nachi argues that the unusual nature of the transaction is apparent from the customer code, as it appears under a miscellaneous new customer code, which encompasses a very small percentage of home market sales.

Torrington claims that the decision in TRBs to exclude one home market sale is distinguishable from the facts in this case. Torrington points out various differences (frequency of sales, time frames, etc.). Torrington argues that, if the Department does find TRBs to be applicable, Nachi's claims are unsubstantiated by the evidence of record and are inconsistent. Torrington claims that, while Nachi says that the model in question was custom-built for a single U.S. customer, it was obviously sold to at least two customers. Torrington argues that the evidence suggests that, although custom built, the model is offered for sale to any customer with a similar application or need. Further, Torrington argues that Nachi has neither provided documentary evidence to support its claim that the model was sold to a single home market customer during the period of review, nor has it provided any information about the particular customer code in question. Torrington also argues that Nachi has not provided documentary evidence to support its claims that only one unit of the model in question was sold during the period of review and that there were only five



transactions involving the model since 1984.

**Department's Position:** Evidence on the record demonstrates that Nachi sold only one unit of the model in question during the sampled months of the period of review. The facts in this case are analogous to those of the TRB case in that the bearing in question was intended for the U.S. market. The nomenclature of the model indicates that it is a specially designed bearing intended for the U.S. market, and there was only one transaction (of one unit) in the home market. In addition, there were only five home market sales of the model since 1984, and it involved a small quantity on a spot basis in unusual circumstances. This evidence indicates that the transaction was made outside the ordinary course of trade. Consequently, we have disregarded this particular transaction in the home market for the purposes of final margin calculations.

**Comment 9:** Nachi argues that, if the single sale of a home market model is found to be in the ordinary course of trade, an adjustment should be calculated to reflect the difference in price resulting from the difference in quantity. Nachi has provided a table reflecting the difference between prices and quantities in the U.S., but was not able to provide the same data in the home market, as there was only one sale during the sample period. Torrington claims that Nachi's argument that an adjustment to foreign market value is required due to differences in prices resulting from vastly different quantities, according to 19 CFR 353.55, is invalid, as Nachi has not provided evidence reflecting the industry practice in Japan (one of the factors of consideration in allowing the adjustment). Torrington further cites the Study of Antidumping Adjustments Methodology and Recommendations For Statutory Change, at 35-36 (ITA 1985), and claims that Nachi has neither shown that they have been granting quantity discounts in the home market for at least twenty percent of such or similar merchandise, nor demonstrated that the cost differences are specifically attributable to the difference in quantities. Torrington claims that Nachi has provided no supporting evidence for tables submitted on page 16 of their case brief.

**Department's Position:** As this transaction has been excluded due to being sold outside the ordinary course of trade, the issue raised by this comment is moot. See Comment 8 above.

## 12. Further Processing

Federal-Mogul contends that the Department erred in its consideration of packing of merchandise further manufactured by SKF-Italy in the United States. Although the Department included the cost of packing in the home market for export to the United States, the Department failed to include SKF-Italy's repacking in the United States in its calculation of U.S. further manufacturing. In addition, Federal-Mogul asserts that in considering SKF-Italy's HM cost of manufacturing the Department erroneously includes the variable "USPACK" which is comprised of packing materials and labor incurred in Italy. Federal-Mogul states that "USPACK" relates only to sales of complete AFBs in the U.S. and not the imported part under consideration.

**Department's Position:** We agree with Federal-Mogul. The cost of repacking in the United States should be included in the cost of further processing incurred in the United States. We have made this change for these final results of review. However, we disagree with Federal-Mogul's statement that U.S. packing incurred in the home market was incurred on finished bearings only. Therefore, the Department has amended the margin analysis program by including U.S. repacking expenses and replacing home market packing with SKF's packing in Italy for export to the United States. SKF's export packing represents packing expenses incurred in Italy for shipment to the United States of both finished AFBs or parts to be further manufactured and is therefore an appropriate addition to the home market portion of further-manufactured merchandise.

**Comment 2:** SKF-Italy comments that the cost of production for further-manufactured sales incorrectly double-counts packing costs. This double-counting of packing costs occurs because packing expenses are included in a variable for packing costs incurred in Italy ("ECOPCOPT") and are also added to both the home market and U.S. portion of further-manufactured merchandise later in the program.

**Department's Position:** The Department has amended the margin analysis program to eliminate the double counting of packing expenses. Packing expenses of exported parts to be further manufactured are added to the cost of production when defining the cost of home market manufacturing.

**Comment 3:** NSK contends that the Department should reverse its decision to analyze imported parts which are further processed after importation into the U.S. NSK asserts that the

Department should base the dumping margin for imported parts on the margin calculated for imported finished bearings of the same class or kind. NSK argues that section 772(e)(3) of the Tariff Act instructs the Department to analyze parts imported into the U.S. and further processed "unless the product ultimately sold to an unrelated purchaser contains a significant amount by quantity or value of the imported product." S. Rep. No. 1298, 93d Cong., 2d Sess. 172-73, reprinted in 1974 U.S.C.A.N. 7185, 7310. NSK points out that in the first review of AFBs the Department concluded that it was not necessary to analyze further-processed merchandise and Torrington did not object at that time to the Department's decision. See Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Antidumping Duty Administrative Reviews; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan, 56 FR 11186, 11187-88 (March 15, 1991); Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 FR 18992, 19028-29 (May 3, 1989). NSK submits that its imports of parts and components have decreased since the first review of AFBs. NSK concludes that the Department can properly decide not to conduct dumping analysis of imported parts separately from finished AFBs where the imported content is not significant.

Torrington argues that the first review and the LTFV investigation were completed on demanding and burdensome schedules. Torrington points out that the Department has included an analysis of further-processed merchandise in Tapered Roller Bearings from Japan. Torrington contends that absent a bearing-by-bearing analysis of the significance of value added through further manufacturing in the U.S., it is impossible for anyone to determine the significance or insignificance of U.S. further manufacturing. Therefore, the Department acted reasonably and consistently with past practice in analyzing parts imported into the U.S. and further processed prior to sale to an unrelated party.

**Department's Position:** We agree with Torrington. Our decision not to examine further-processed bearings in the first review was based on the particular circumstances of that review, as reflected in the record. However, in this review, as a result of allegations received from Torrington and Federal-



Mogul, we have decided to examine these sales to determine if any pricing patterns have developed as a result of our decision in the first review. In addition, we agree that absent an examination of these transactions, we have no basis to declare them significant or otherwise. Therefore, we have included antifriction bearing parts which are further processed after importation into the United States in our margin analysis.

### 13. Packing and Movement Expenses

*Comment 1:* Torrington asserts that the Department should use BIA for FAG-Italy's and FAG-UK's U.S. packing material and packing labor expenses because FAG allocated these expenses over all sales, instead of reporting customer- or transaction-specific expenses. Moreover, FAG indicated that it was impossible to isolate these expenses for Italian ball bearings only or UK-made ball bearings and cylindrical roller bearings only. Torrington suggests that the Department use the greater of the amount reported by FAG in the investigation or first review, or the highest amount for these adjustments as reported by any other Italian or UK company for the corresponding class or kind of merchandise in this review as BIA for FAG's packing material and labor expenses. FAG-Italy and FAG-UK respond that the Department has historically accepted reasonable allocations over all sales instead of transaction-by-transaction reporting of expenses. Final Determination of Sales at Less Than Fair Value; Industrial Belts from Singapore, 54 FR 15489 (April 18, 1989). Further, this allocation methodology was verified and accepted in the first review.

*Department's Position:* We have no evidence that FAG's allocation methodology is unrepresentative of its actual experience and believe that FAG has made an effort to allocate this expense in a reasonable and accurate manner.

*Comment 2:* Federal-Mogul maintains that the Department should not deduct home market packing from foreign market value because SNR has not demonstrated that a specific agreement pertained to every sale indicating that packing expenses were included in the price. According to Federal-Mogul, SNR allocated its packing material and labor expenses across all sales, although SNR's general conditions of sale indicate that packing is not included in the price unless the agreement includes a specific agreement to the contrary.

*Department's Position:* We verified SNR-France's packing material and

labor expenses and are satisfied that the company allocated this expense only across relevant transactions.

*Comment 3:* Federal-Mogul contends that the Department should increase SNR-France's U.S. packing material expense since the company indicated that these expenses were greater than those incurred for home market sales, but failed to properly quantify the difference in its submission. SNR maintains that bearings are packed in the same crates regardless of destination, although SNR uses airbags for export sales. SNR-France notes that it keeps track of airbags purchased yearly but is not able to distinguish between airbags purchased for bearings during the POR and airbags purchased for bearings outside the POR.

*Department's Position:* We agree with Federal-Mogul and have added the expense incurred for airbags for U.S. merchandise for the final results.

*Comment 4:* Federal-Mogul maintains that the Department should recalculate SNR's U.S. packing labor expense. SNR reported a percentage of U.S. warehouse salaries as packing labor expenses in the U.S., but the company omitted fringe benefits from the quantification of the labor expense shown in the response and on the tape submission. SNR argues that the cost of fringe benefits was already included in SNR-USA's allocation.

*Department's Position:* We consider the fringe benefits of the warehouse personnel to be a part of the expense associated with packing merchandise for shipment to the customer. Contrary to SNR's assertion, it did not include fringe benefits in its packing labor expense. We have, therefore, added this amount to the U.S. packing labor expense for the final results.

*Comment 5:* Federal-Mogul contends that NSK understated its U.S. repacking expense and overstated its U.S. indirect selling expenses by including U.S. repacking expense in the U.S. indirect selling expenses. The Department should make a downward adjustment to the other indirect selling expenses and an upward adjustment to U.S. repacking expense by the same factor. If the Department does not make the above adjustments, the Department should treat the U.S. indirect selling expense as a direct expense. NSK maintains that repacking labor cannot be separately identified in any way. In any event, the portion of warehousing labor that is associated with repacking for sale in the U.S. is de minimis, because imported merchandise is normally shipped from the U.S. warehouse in its original containers.

*Department's Position:* We agree that NSK overstated its U.S. indirect selling expense. We have reduced NSK's indirect selling expense by the amount of U.S. repacking labor using the factor NSK provided. We used the same factor to create the U.S. repacking labor expense which was deducted from U.S. price.

*Comment 6:* Torrington argues that the Department erred in making a direct expense adjustment to foreign market value for domestic pre-sale freight because this expense cannot be directly linked to specific sales. Torrington maintains that while section 772(d)(2)(A) and 19 CFR 353.41(d)(2)(i) instruct the Department to adjust the U.S. price for all inland freight expenses, there is no corresponding provision to make such an adjustment to foreign market value.

FAG, Koyo, NSK, and SKF contend that the Department's decision to deduct pre-sale inland freight expenses from foreign market value is in keeping with the Department's past practice. Koyo and NSK assert that Torrington's argument has been refuted by the U.S. Court of International Trade's decision in *The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 90-10-00508, Slip Op. 92-24 (CIT March 5, 1992). These respondents maintain that it is necessary to deduct pre-sale inland freight from the home market price as well as the U.S. price in order to establish an accurate and meaningful comparison by using U.S. and home market ex-factory prices as a basis of comparison. Koyo adds that while the U.S. antidumping law clearly prescribes mandatory adjustments to the U.S. price, the law does not preclude these adjustments from the calculation of foreign market value. Instead, the definition of foreign market value allows the Department to adjust for circumstances of sale which are directly related to home market sales under consideration.

*Department's Position:* We agree with respondents. In keeping with the Department's decision in the Final Determination of Sales at Less Than Fair Value; Gray Portland Cement and Clinker from Mexico, 55 FR 29244 (July 18, 1990), we determined that pre-sale freight should be treated as a movement expense and deducted from foreign market value. Pre-sale and post-sale movement expenses are treated in the same manner in the calculation of an ex-factory U.S. price. These expenses must be treated in a similar manner in the home market to ensure an equitable price-to-price comparison.



*Comment 7:* Federal-Mogul contends that the Department should deduct from U.S. price air freight costs for one shipment for which Meter did not receive reimbursement for air freight costs.

*Department's Position:* We agree with Federal-Mogul. We deducted from U.S. price air freight for that one shipment for which Meter was not reimbursed.

*Comment 8:* Federal-Mogul argues that the Department's verification report for Meter indicated that Meter had allocated incorrectly its additional U.S. inland freight expense and the company had agreed to submit a revised tape containing the correct allocation for this expense. Federal-Mogul contends that the Department should use the highest value for this expense as BIA for all transactions which incurred this expense since the company's February 25, 1992 tape submission did not reflect the revised allocation methodology. Meter maintains that the correct additional U.S. inland freight expense was included in the January 24, 1992 submission, which was verified. The February 25, 1992 submission included the correct additional U.S. inland freight expense.

*Department's Position:* We agree with Meter. The correct additional U.S. inland freight expense was included in the January 24, 1992 submission. Our verification confirmed this. The February 25, 1992 submission also included the correct allocation.

*Comment 9:* Federal-Mogul contends that the Department should treat SKF-Italy's export selling expenses as direct selling expenses for U.S. sales because SKF included domestic inland pre-sale freight in export selling expenses. Federal-Mogul asserts that the Department has advised the U.S. Court of International Trade that domestic inland pre-sale freight is a movement expense which must be subtracted from U.S. price. SKF asserts that domestic inland pre-sale freight has been treated consistently and, therefore, no advantage has been gained in the calculation of U.S. price versus FMV. SKF further asserts that the Department accepted SKF's methodology in the first review.

*Department's Position:* The Department considers domestic pre-sale freight a movement expense to be deducted in the calculation of USP. Because SKF failed to report domestic pre-sale freight separately and included the expense as part of export selling expenses, the Department has used, as BIA, the higher of FAG-Italy's expense rate domestic pre-sale freight rate and deducted it from USP as a movement expense. For the final results, we treated

the export selling expenses as indirect selling expenses.

*Comment 10:* Federal-Mogul argues that the Department should treat SKF-Italy's bonded warehouse expenses as movement expenses, because the bonded warehouse exists solely to accommodate PP sales to one customer. SKF asserts that the bonded warehouse expenses consist of pre-sale warehousing and, according to the Department's practice, such expenses are considered indirect selling expenses.

*Department's Position:* We agree that SKF's bonded warehousing expenses were incurred prior to the date of sale. Consistent with our longstanding practice, we treated these expenses as indirect selling expenses. Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, 52 FR 30700 (August 17, 1990); NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., and NTN Toyo Bearing Co., Ltd. v. U.S. and Timken Co., 747 F. Supp. 728 (CIT 1990).

*Comment 11:* Federal-Mogul contends that the Department should use the factor reported in the narrative portion of SKF-France's, SKF-UK's and SKF-Italy's responses to generate U.S. inland insurance expenses for SKF's U.S. inland insurance. SKF assigned "zero" to the U.S. inland insurance variable, because it claimed it was de minimis. However, SKF reported other U.S. movement expenses where the percentage adjustment factor is even lower than the one reported for U.S. inland insurance. SKF argues that its U.S. inland insurance is insignificant by any standard and should be disregarded.

*Department's Position:* We agree that SKF understated the amounts of U.S. inland insurance on its computer tape. We have used the factor provided by SKF to calculate U.S. inland freight and deducted this amount from U.S. price for the final results.

*Comment 12:* Torrington argues that the Department should use BIA for SKF-Germany's, SKF-Sweden's, and SKF-UK's ocean freight, U.S. inland freight, U.S. brokerage and handling expenses, and U.S. Customs duty. Contrary to the instructions in the Department's deficiency letter, SKF failed to report these movement expenses on a transaction-by-transaction basis, or provide average figures based on reasonable allocations, or at a minimum, demonstrate that its selections of sample expenses were reasonable. SKF asserts that SKF's U.S. accounting and warehouse systems do not separately identify the expense or weight

associated with these movement expenses. In order to report these expenses as required by the Department, SKF manually compiled records from various sources for a representative sample. The Department has previously verified SKF's sample and has been satisfied that this is indeed a representative sample.

*Department's Position:* Although the Department prefers expenses to be reported on a transaction-by-transaction basis, reasonable allocations are acceptable. The five sampled months chosen by SKF to sample the aforementioned expenses include at least one month in each quarter of the review period. This methodology is identical to the methodology verified for the last review and found to be representative of actual expenses incurred. We have accepted SKF's ocean freight, U.S. inland freight, U.S. brokerage and handling expenses, and U.S. Customs duty expenses as reported.

*Comment 13:* Torrington maintains the Department should assign a BIA rate in lieu of Koyo's air freight allocation because the company failed to allocate its expense on a transaction-specific basis as required by the Department's deficiency letter. Koyo counters that the Department should continue to accept its allocation methodology. Koyo indicates in its response that its air freight expenses were not incurred on a transaction- or customer-specific basis, and therefore it would not be appropriate to allocate it on a transaction-specific basis.

*Department's Position:* We have accepted Koyo's allocation of its air freight expense as reasonable. For the final results, we have used Koyo's air freight expense as reported, since there is no evidence on the record to conclude that Koyo's allocation methodology is not representative of the company's actual experience.

*Comment 14:* Nachi contends that the Department's selection of U.S. sample weeks resulted in a disproportionate and unrepresentative selection of U.S. sales which incurred air freight expenses, and that the Department should eliminate all ESP sales which incurred air freight expenses from its calculation of Nachi's dumping margin. Torrington maintains that section 777A requires that the Department use sampling and averaging methodologies which produce results which are representative of the sales under consideration, rather than results representative of underlying adjustments and charges. Nachi has not demonstrated that the Department's methodology failed to produce



representative transactions. Moreover, Torrington adds that Nachi is suggesting the Department is required to test whether every circumstance-of-sale adjustment occurred evenly throughout the period of review.

**Department's Position:** The Department agrees with Torrington. In choosing a random time-sampling methodology, we have acted within the authority granted to the Department under section 777A to "use averaging and generally recognized sampling techniques." Nachi does not argue that the time-sampling technique in general produces unrepresentative results, but that the particular sample selected using this technique has an air freight anomaly which must be adjusted. However, insofar as the Department has selected a representative sample, that sample must be considered to be reflective of the broad range of Nachi's sales transactions. Therefore, acting upon Nachi's proposals would compromise this sample and skew the results.

**Comment 15:** Federal-Mogul maintains that Asahi reported Japanese Bearing Inspection Institute (JBII) charges, containerization expenses, paid to an unrelated subcontractor which puts the merchandise in containers for shipment, and miscellaneous expenses (e.g. bank charges, L/C charges, etc.) as export selling expenses. Federal-Mogul asserts that, consistent with section 772(d)(1)(A) of the Tariff Act, the Department should treat Asahi's JBII and containerization expenses as movement expenses because these charges are costs "incidental to placing the merchandise in condition, packed ready for shipment to the United States" and, thus, should be deducted from USP as a movement expense.

**Department's Position:** We reallocated Asahi's export selling expenses, extracting JBII and containerization expenses. For the final results, we treated JBII fees as direct selling expenses, containerization charges as packing expenses, and the miscellaneous expenses (e.g., bank charge and L/C charges) as indirect selling expenses.

**Comment 16:** Federal-Mogul maintains that the Department should set SNR's home market inland freight variable to zero for all transactions with FOB as the term of sale because SNR allocated inland freight expenses across all sales even though it did not incur it for FOB sales. In addition, Federal-Mogul contends that the Department should reallocate SNR's U.S. inland freight only to non-FOB sales since the company allocated this expense across all sales but only incurred it for non-FOB

transactions. SNR responds that its response was verified and the appropriateness of its allocation methodology has been discussed in previous submissions.

**Department's Position:** We agree with Federal-Mogul that SNR allocated HM and U.S. inland freight across all sales, although inland freight was incurred for only a portion of the sales. Contrary to SNR's assertion, we did not verify its overall freight expenses. For the final results, we have assigned freight expenses only to those sales on which they were incurred.

**Comment 17:** Federal-Mogul contends that, at a minimum, the Department should treat SNR's export selling expense variable as a direct selling expense. Since SNR-USA indicated that it did not incur domestic brokerage and handling, domestic inland pre-sale freight, and international freight expenses, SNR-France either reported these expenses on the home market sales tape and hence they were improperly deducted from foreign market value, or SNR improperly included these freight expenses in the export selling expense variable which contained the only expenses for U.S. sales incurred by SNR-France. SNR contends that its response was verified and the appropriateness of its allocation methodology was discussed in previous submissions.

**Department's Position:** We are satisfied that SNR accurately reported its export selling expenses. At verification of SNR-France, we examined the documentation of the cost center dedicated to subsidiary expenses. In some instances, SNR-France paid transportation charges, but was subsequently reimbursed by SNR-USA. SNR France did not incur brokerage and handling charges or "international" freight charges in France. Expenses incurred in France on behalf of U.S. sales are recorded under domestic inland insurance and domestic inland freight on the U.S. sales tape. For the final results, we used SNR's freight expenses as reported.

**Comment 18:** Federal-Mogul contends that the Department should reallocate SNR's U.S. brokerage and handling and U.S. Customs duty expenses because SNR substantially understated these expenses. Federal-Mogul contends that SNR reported expenses associated with the much smaller universe of AFBs entered, but has allocated them over the much larger universe of AFBs sold. SNR-USA counters that U.S. brokerage and handling and U.S. Customs duty was calculated as a percentage of entered value.

SNR knows the total entered value of all types of bearings and the total for these expenses. It cannot, however, segregate this expense for AFBs as opposed to TRBs. SNR further argues that it is not relevant whether U.S. brokerage and handling and Customs duties are reported as a percentage of SNR-USA's selling price or as a percentage of entered value. The result is mathematically neutral because the same dollar amount of U.S. Customs duties will be collected. Moreover, SNR contends that its response was verified and the appropriateness of its allocation methodology was discussed in a previous submission.

**Department's Position:** Contrary to SNR's statement, the Department did not verify U.S. brokerage and handling and U.S. Customs duty expenses. However, we agree with SNR that it did not allocate these expenses over total sales as claimed by Federal-Mogul. Instead, SNR allocated them over entered value. For the final results, we used SNR's U.S. brokerage and handling and U.S. Customs duty expenses as reported, because we determined that the allocation methodology was reasonable.

**Comment 19:** Federal-Mogul maintains that the Department should disallow FAG-Italy's, FAG-UK's, and FAG-Germany's upward adjustment to U.S. price arising from some shipments for which the customer repays FAG-US for freight expenses incurred and prepaid by FAG. Since FAG reported freight reimbursements on a transaction-specific basis, but allocated freight expenses over all U.S. sales, the freight cost deducted from U.S. price may be much less than the amount of freight reimbursement added to the U.S. price. As a result, FAG could be granted a substantial artificial increase in U.S. price which masks dumping margins. FAG-Germany, FAG-UK, and FAG-Italy respond that, contrary to Federal-Mogul's argument, it reported prepaid freight expenses incurred by FAG and reimbursement from the customer on a transaction-specific basis. In some cases, the amount of reimbursement received by FAG was greater than the amount paid by FAG since it actually made money on the freight charges. For the final results, the Department should continue to add the amount of freight reimbursement to U.S. price after subtracting the amount of freight paid for by FAG.

**Department's Position:** We disagree with Federal-Mogul. Based on the information provided by FAG regarding its freight expenses, we have determined that FAG's allocation of



freight charges is reasonable and complete. Simply because the majority of FAG's U.S. freight expenses are allocated does not preclude a respondent from reporting other revenue received upon reimbursement from an unrelated customer on an actual basis. Whenever possible, the Department's preference remains sales-specific reporting of this expense. Federal-Mogul's concern that FAG may be masking dumping margins through the reporting of other revenue is not supported by the record or Departmental reporting requirements.

*Comment 20:* Torrington contends that the Department should use BIA for the freight expense absorbed by SKF-USA on account of some sales to U.S. customers because it is unclear from the company's response whether it correctly reported this expense. SKF-Sweden replies that in its supplemental response it explained that it assigned a freight expense to all sales to automotive aftermarket customers which might have incurred this expense, even though SKF knew that it did not absorb the freight expense for some of these sales. Similarly, for all OEM customers for whom it absorbed freight expenses, SKF reported a freight expense. For industrial aftermarket customers, SKF calculated customer-specific average weekly sales values to determine whether the purchase attained the minimum weekly sales value required for SKF to absorb the freight expense. If anything, SKF overreported this expense. In addition, this methodology was verified and accepted in the first review.

*Department's Position:* The Department considers SKF-Sweden's freight allocation to be a reasonable and accurate allocation. We do not believe that SKF underreported this expense, because SKF reported an expense amount even for those transactions for which there was a question as to whether they incurred the expense. Therefore, we accepted SKF's domestic inland freight expense as reported.

*Comment 21:* Federal-Mogul contends that FAG-Germany reported ocean freight in dollars and, therefore, it should be removed from the array section of the computer program, which converts all expenses in German marks into dollars. FAG-Germany notes that ocean freight was reported in German marks for all sales.

*Department's Position:* Ocean freight was reported in German marks for all sales. Therefore, no correction was necessary.

#### 14. Discounts, Rebates and Price Adjustments

The Department has treated home market discounts, rebates and price adjustments as direct expenses if they could be traced on a transaction-specific basis. This includes adjustments that were incurred as a fixed and constant percentage of sales price over all sales and were reported on a customer- or product-specific basis. If these adjustments were not fixed and constant but reported on a customer-specific basis, they were treated as indirect expenses. If the discounts, rebates and price adjustments could not be traced on a customer-specific basis, no adjustment was made. Although we allowed customer-specific allocations on home market sales in the first reviews, we have reconsidered our position and decided to allow only price adjustments which were tied to specific sales under comparison. In this way, we avoid applying reductions to FMV for sales that did not actually incur those reductions.

The Department deducted all U.S. discounts, rebates, or price adjustments as direct expenses. If these expenses were not reported on a transaction-specific basis, we used BIA for the expense.

*Comment 1:* Torrington contends that the Department should not make any adjustment for Koyo's home market post-sale billing adjustments or, at the very least, continue to classify them as indirect selling expenses. Torrington notes that Koyo did not allocate this adjustment on a product- and invoice-specific basis as instructed in the questionnaire, and that there is nothing on record indicating that these adjustments were not related to noncovered merchandise. Further, Koyo's allocation methodology assigns credit and debit memos to the period of review without linking them to specific invoices to establish that the credits or debits were related either to period of review sales or products under review. For the final results, the Department at a minimum should deny the adjustment to foreign market value for reported debits.

Koyo contends that the Department should classify its post-sale billing adjustments as direct adjustments to FMV for the final results since they are revisions or corrections to prices, not circumstance-of-sale adjustments. Accordingly, there is no need to tie price revisions directly to specific transactions because the directly related test is applicable only to circumstance-of-sale adjustments. Koyo made post-sale price adjustments on an annual or semi-annual basis based on

considerations which crossed individual sales and product lines. In previous cases, the Department has deducted price adjustments directly from foreign market value.

Koyo argues that even if the Department considers these adjustments to be circumstance-of-sale adjustments, these adjustments bear a direct relationship to sales under the test articulated by the U.S. Court of Appeals for the Federal Circuit in *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983 in which the Court defined the "direct relationship" test to necessitate that a circumstance-of-sale adjustment must only have a "reasonably direct relationship" to the sale. Koyo has established that its allocation methodology ties its adjustments directly to the sales under consideration by accurately allocating them over all sales to which they apply.

*Department's Position:* We have determined that Koyo did not tie the reported price adjustments to the products on which they were granted. Therefore, we have treated the post-sale price adjustment as an indirect expense consistent with our decision in Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan, 56 FR 26054 (June 6, 1991), Final Results of Antidumping Duty Administrative Review; Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan, 56 FR 41513 (August 21, 1991), and Final Results of Antidumping Duty Administrative Review; Antifriction Bearings, and Parts Thereof, From the Federal Republic of Germany, 56 FR 31717 (July 11, 1991). We treated Koyo's post-sale billing adjustment as an indirect expense, rather than a direct price adjustment.

*Comment 2:* Torrington contends that the Department should not accept NMB/Pelmeq Singapore's and NMB/Pelmeq Thailand's U.S. allocation methodology for the variable "OTHDISC2" because, contrary to the questionnaire's instructions, NMB/Pelmeq did not allocate this adjustment on an invoice- and product-specific basis. Instead, NMB/Pelmeq allocated the net amount of debit and credit notes across all customers and sales which dilutes the impact of low pricing for certain customers. Torrington argues that, at a minimum, the Department should disallow all debit amounts for notes that were not linked to corresponding sales, and allocate the total amount of credits to U.S. sales.



NMB/Pelmecc contends that its allocation methodology should be accepted. Contrary to Torrington's allegation, NMB/Pelmecc was able to manually trace all but a tiny portion of its billing adjustments to specific sales which it reported under the variable "OTHDISC2."

*Department's Position:* We disagree with Torrington's assertion that the Department should reallocate NMB/Pelmecc Singapore's and NMB/Pelmecc Thailand's discounts on U.S. sales reported under the variable "OTHDISC2." NMB/Pelmecc Singapore and NMB/Pelmecc Thailand were able to tie all but a small number of their billing adjustments to specific transactions. The remaining billing adjustments were allocated over all customers who could have received an adjustment. We have no evidence that this allocation is not representative of the respondents' actual experience. This allocation methodology is reasonable, and has been accepted for the final results of review.

*Comment 3:* Torrington claims that certain home market billing adjustments claimed by SKF-Germany cannot be tied to specific sales and could possibly represent a method of price manipulation to avoid antidumping margins. Even if the Department considers the billing adjustments to be rebates, SKF-Germany has provided no evidence that they were contemplated at the time of sale. Torrington contends that, under these circumstances, the Department should deny the requested adjustment.

SKF-Germany states that they have demonstrated the accuracy and reliability of the billing-adjustment calculations and that the Department has verified the methodology used by SKF-Germany to identify and calculate its billing adjustments and found no discrepancies.

*Department's Position:* Because certain home market billing adjustments have not been tied to specific products on which they were granted, the Department has treated these adjustments as indirect expenses. See Comment 1 above.

*Comment 4:* Torrington claims that the Department should have verified SKF-Sweden's billing adjustments to be certain that SKF properly differentiated between rebates and price adjustments. Torrington maintains that this is especially relevant for "Billing Adjustment 2," which SKF could not tie to a specific transaction or product. Torrington asserts that the Department should draw a negative inference and reject negative adjustments in the home market or positive adjustments in the U.S. sales listing.

SKF-Sweden claims that the Department examined the methodology used by SKF to identify and calculate billing adjustments during verification in the first administrative review. The methodology used in this review, SKF maintains, is identical.

*Department's Position:* Section 776(b)(3) of the Tariff Act provides that verification is required only if requested in a timely fashion by an interested party and if no verification was conducted during the two immediately preceding reviews and determinations, unless good cause exists to conduct a verification. Although Torrington's request was timely, verification was not mandated because SKF was verified in the first review and no evidence was presented in the current review that amounted to good cause. The Department previously verified and accepted SKF's billing adjustments, which are customer- and product-specific. Therefore, the Department has accepted SKF-Sweden's billing adjustment claim for the purposes of these final results. SKF-Sweden does not incur "Billing Adjustment 2" expenses.

*Comment 5:* Torrington claims that the information on the record is too incomplete to allow the Department to accept INA-Germany's billing adjustment claim. Torrington asserts that because billing adjustments represent a potential way for respondents to manipulate prices to avoid antidumping margins, the Department should assume that all billing adjustments which lower the home market price were undertaken to avoid antidumping margins and should not allow the adjustment. Alternatively, the Department should treat these adjustments as indirect selling expenses.

INA-Germany claims that it described the types of billing adjustments in its supplemental response and has reported the adjustments in accordance with the Department's specific instructions. INA contends that the Department should therefore accept its billing adjustment claim.

*Department's Position:* We believe that INA-Germany has adequately responded to the Department's instructions for reporting billing adjustments. Billing adjustments are reported on a product- and customer-specific basis, and the Department has no evidence to support any contention that the reported quantity and price changes were manipulated in any way. Therefore, the Department has accepted INA's billing adjustment claims as direct expenses.

*Comment 6:* Torrington contends that Koyo must establish that its rebates represent payments on specific sales,

rather than allocations paid to all customers or distributors. Further, Torrington argues that Koyo concedes that invoices generally covered both non-subject and subject merchandise, and that adjustments for these invoices can only be identified for the distributor's entire account, rather than individually for specific models on separate invoices.

Koyo claims that the Court of Appeals for the Federal Circuit determined that a circumstance-of-sale adjustment need only have a "reasonably direct relationship" to the sale. *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983). According to the Court, the respondent does not have to tie a particular expense amount to a given transaction. Instead, a reasonable apportionment of the expense establishes a "direct relationship" to the sales if it is shown that a portion of the expenses was attributable to sales. The Department accepted rebates as directly related to sales, even though the rebate program contained a combination of products since a proportionate share of the expense was correctly allocated to the sales. See Final Results of Antidumping Administrative Review; Color Television Receivers, Except Video Monitors, From Taiwan, 53 FR 49706 (1988). Koyo allocated its rebate amounts across all products to which the rebates applied and only to those distributors who participated in the program and purchased AFBs. Hence, Koyo's allocation methodology establishes a direct relationship to its sales.

*Department's Position:* Koyo granted its rebates on sales of non-covered as well as covered merchandise. However, Koyo reported that it allocated rebates across all products to which the rebates applied and only to those distributors who qualified. Since Koyo's rebate adjustment is based on a set percentage based on total sales value to a customer and the company allocated the adjustment only to those products and customer's covered by the rebated program, the rebate program qualifies for a direct adjustment to the home market price.

*Comment 7:* Torrington contends that Koyo must prove that the terms of the rebate program were known to the customer at the time of sale, because the company should not be allowed to grant post-sale rebates in order to avoid the imposition of antidumping duties. Koyo counters that it indicated in its response that its rebate programs were known to its customers at the time of sale.

*Department's Position:* The Department generally permits



adjustments to USP and home market price for rebates where respondents have granted and paid them on the sale of subject merchandise to unrelated parties during the period of review, and which are part of the respondent's standard business practice. We have determined that the rebate adjustment claimed by Koyo is allowable because it is customary and an ordinary part of its business practices.

**Comment 8:** Torrington argues that the Department should continue to disallow Koyo's rebates paid to related parties since the Department has refused to grant an adjustment in the past for such rebates unless the respondent could demonstrate that the rebates to related parties are consistent with rebates to arms-length customers. Final Results of Antidumping Administrative Review; Television Receiving Sets, Monochrome and Color from Japan, 46 FR 12221 (1981). Koyo has failed to demonstrate that rebates to related parties are consistent with those given to arm's-length customers. Nor has Koyo shown that its related-party sales of ball bearings, after adjusting for rebates, were at arm's length.

Koyo argues that since the Department determined that Koyo's ball bearing sales to related parties were made at arm's length, the Department should make an adjustment for rebates for sales to related parties. Koyo contends that it cannot be argued that its related-party sales were determined to be at arm's length for the purpose of retaining them in the home market data base, but were not at arm's length for the purpose of adjusting the home market price.

**Department's Position:** It is not the Department's policy to automatically exclude rebates paid to related parties. Since we determined that Koyo's sales to related parties were at arm's length by comparing related and unrelated prices net of selling expenses, discounts and rebates, we have allowed these rebates as deductions from FMV. Final Determination of Sales at Less than Fair Value: Coated Groundwood Paper from Finland, 56 FR 456364 (November 4, 1991).

**Comment 9:** Nachi maintains that the Department should reclassify its rebates as direct selling expenses for the final results. This reclassification is warranted because Nachi allocated its rebates on a transaction-specific basis or on the basis upon which they were paid or granted to the qualifying product codes on a quarterly basis as in the investigation and the first review. Moreover, Nachi's rebates were verified and treated as direct selling expenses in the first review.

Torrington argues that the Department should have denied Nachi's home market rebates in their entirety, rather than including them in indirect selling expenses, because Nachi did not demonstrate that the expense was directly related to the sales under consideration. In addition, Torrington notes that *The Timken Co. v. United States*, 673 F. Supp. 495, 512-13 (CIT 1987) asserts that it is up to the respondent to demonstrate that home market expenses are direct in nature. Although Nachi claims that it reported its rebates on a transaction- and customer-specific basis or allocated them on the basis upon which they were granted or paid, it is obvious that Nachi did not directly relate these expenses to specific part numbers or sales. Nachi's argument that the Department verified and accepted its rebate expenses as direct selling expenses in the previous review is irrelevant because the Department has not verified that Nachi's methodology is the same for this review and the Department is not obliged to accept a company's allocation methodology solely because it was accepted in previous reviews.

**Department's Position:** We reclassified Nachi's rebates as direct selling expenses for the final results. Nachi indicated in its response that it allocated rebates on a transaction-specific basis. This allocation methodology is identical to the methodology used and verified in the first review.

**Comment 10:** Nachi contends that the Department should not disallow one of its home market rebates which Nachi claims it paid to unrelated customers of Nachi Bearing Company (NBC) and related distributors, who were later reimbursed by Nachi. The rebate reported by Nachi is not the amount for reimbursement of NBC by Nachi, but rather the rebate to the unrelated customer. Moreover, the Department should treat this rebate as a direct expense since it was verified and treated as such in the first review. Torrington responds that Nachi has changed its description of this rebate after the Department decided to disallow it for the preliminary results. Originally Nachi indicated that it paid the rebate to NBC and other distributors, but now Nachi is arguing that it paid the rebate to unrelated customers of NBC and related distributors. In addition, there is no evidence on the record to conclude that this rebate was paid to unrelated customers since the company's response was not verified.

**Department's Position:** We agree with Torrington that Nachi first indicated that it paid the rebate to NBC and other

distributors, then argued that it paid the rebate to unrelated customers of NBC and related distributors. We have been unable to determine from the evidence on the record to whom this rebate was paid. Due to this ambiguity, we have disallowed this rebate claim for the final results.

**Comment 11:** Torrington contends that the Department should use BIA for FAG-Italy's and FAG-Germany's rebates since FAG reported U.S. rebates actually credited or paid during the period of review, but, in contrast to FAG's reporting of home market rebates, it did not report estimated U.S. rebates earned but not paid during the period of review. Comparison of foreign market value reflecting a deduction for estimated as well as actual rebates to a U.S. price less only actual rebates would yield distorted results. The Department should instruct FAG-Italy to report all rebates paid during the period of review for the final results. If this is not possible, the Department should use an estimated rebate rate as BIA for U.S. sales or deny an adjustment to foreign market value for rebates.

FAG-Italy and FAG-Germany respond that it reported its U.S. rebates based upon the customer's specified volume of sales during the year. The company reported its home market rebates in a different manner since they were not granted in the same manner as U.S. rebates. Home market rebates are basically known and agreed to in advance.

**Department's Position:** FAG-Italy and FAG-Germany reported rebates on U.S. sales throughout the POR, whether actual or estimates based on 1990 rebate rates. Based on the evidence on the record, there is no reason to conclude that FAG-Italy or FAG-Germany understated rebates on U.S. sales or overstated home market rebates. Therefore, we have accepted rebates as reported in both markets.

**Comment 12:** Federal-Mogul contends that the Department should reclassify SNR's home market rebates as an indirect selling expense since the rebates are negotiated at the end of the year. SNR maintains that the rebates are negotiated before the end of the year based upon the value of the customer's purchases, but the rebates are paid only after the close of the year when the customer's total purchases are known.

**Department's Position:** We verified SNR-France's methodology of granting rebates and are satisfied that the rebates are negotiated in advance and not at the end of the year. However, we agree with Federal-Mogul that home market rebates should be treated as an



indirect expense because they were allocated over total sales, and not on a product- or customer-specific basis.

**Comment 13:** Federal-Mogul claims that SNR's allocation of its U.S. rebate expense is unreasonable. In its deficiency response, SNR reported the customer numbers for those who actually received a rebate. Federal-Mogul asserts that the Department should redefine SNR's rebate variable so that it equals the actual rebate paid on each transaction with a customer code reported in the deficiency response.

With respect to U.S. rebates, SNR-USA points out that, in its experience, total rebates as a percentage of sales does not vary materially from year to year. Because the period of review falls in between two fiscal years, SNR preferred, for accuracy's sake, to use the latest audited amount for rebates over total sales.

**Department's Position:** The Department agrees with Federal-Mogul and has redefined SNR's rebate variable to equal the actual rebate paid on all U.S. sales to the customers reported in the deficiency response.

**Comment 14:** Federal-Mogul asserts that the Department should disallow the claim for projected rebates on all 1991 home market sales by RHP's Precision Division warned the Department that the Precision Division's sales are below target level and it is unclear what rebate percentage, if any, will be paid on 1991 Precision sales in the home market.

RHP contends that because 1991 rebates had not yet been calculated at the time of the Section C and supplemental Section C response due dates, an estimate of rebates was reported. RHP then informed the Department that sales for the Precision Division were below target and actual rebates paid could be less than estimated. RHP notes that rebates by the Precision Division do not involve substantial sums and actual rebate percentages paid are now provided in the April 21, 1992 rebuttal case brief.

**Department's Position:** Because RHP has informed the Department that actual rebates paid were lower than estimated rebates, we have accepted the actual rebate expenses as reported in RHP's rebuttal case brief.

**Comment 15:** Federal-Mogul claims that the Department erroneously failed to deduct "REBATE5E," a variable representing a rebate expense, from its calculation of USP for SKF-Germany. Federal-Mogul asserts that the Department should correct this overstatement of U.S. prices by deducting "REBATE5E" in its calculation of USP.

**Department's Position:** We agree that all rebates should be accounted for in the calculation of USP. However, the rebate in question ("REBATE5E") does not apply to any ESP sale in the sample months. Although the field does exist on the computer data submission, there are no values in the field.

**Comment 16:** Torrington maintains that INA does not have discount and rebate schedules and continuously renegotiates discounts. In addition, Torrington asserts that INA has provided discounts after the sale has been made that did not appear to be contemplated at the time of sale. Because of these circumstances, and the fact that INA has failed to provide meaningful information as to how it negotiates or implements discounts and rebates and has failed to clarify when post-sale discounts and rebates are provided, the Department should disallow these adjustments or, alternatively, consider them unproven and treat them as indirect selling expenses only.

INA-Germany claims that the portion of a paragraph from INA's November 28, 1991 supplemental response that Torrington refers to in its preliminary comments does not describe post-sale discounts, nor does it indicate that INA continuously renegotiates discounts. INA maintains that the passage describes INA's "absence of objection to a particular claim of a cash discount" and the nature, timing and amount of the discount is not changed by the fact that INA waived the time limitation for taking the cash discount. INA further asserts that it has fully responded to the Department's request for supplemental information concerning information on discounts and rebates.

**Department's Position:** The Department is satisfied that INA-Germany has reported sufficient information concerning its rebate and discount programs. These rebates and discounts are contemplated prior to a sale. This information is included in INA's customer-specific masterfile, and was verified by the Department in the first review. We have, therefore, accepted the adjustments as reported.

**Comment 17:** Torrington contends that, in order not to artificially inflate U.S. price, the Department should continue to deny Koyo's claimed upward adjustment to the U.S. sales price for alleged credits associated with its AKC's discount programs. Torrington claims that such credits claimed by Koyo may not have been paid and should not be accepted without supporting documentation linking them to sales of the subject merchandise during the period of review. Torrington

further argues that Koyo's credits should not be accepted because they are not allocated on a transaction-specific basis as required by U.S. Customs Service regulations. See 19 CFR 141.86(g).

Koyo contends that the Department accepted its reporting of U.S. discount programs in other reviews and erred in setting credits from AKC's discount policy to zero. To calculate customer-specific discount factors, Koyo divided the sum of the monthly allowance discount balances (credit and debit) by total sales to the customer during the period of review. Koyo states that credits for discounts may occur in cases when a customer pays a contested invoice that is subject to a discount and subtracts the claimed allowance from the invoice and remits the balance to AKC. In some cases, where AKC disallows the discount claim and the customer remits payment for the amount of the claimed allowance in a different month, the allowance account will show a credit. If the credit amount is greater than all the debits recorded during the monthly period, the month-end balance will show a credit for AKC. Moreover, Koyo asserts that Torrington's reference to the U.S. Customs Service's regulations is in error since this section of the regulations refers only to discounts negotiated at the time of sale. Koyo granted discounts to U.S. customers for early payment and to resolve disputes which are negotiated after the sale. The statute and the U.S. Customs Service's regulations clearly state that post-importation discounts are not considered in calculating the value of goods for U.S. Customs purposes. See Section 402(b)(4)(B) of the Trade Agreements Act of 1979 (19 USC 1401a(b)(4)(B)); 19 CFR 152.103(a)(4).

Koyo also notes that its narrative is in error concerning its reporting of U.S. discounts. Koyo reported that credit transactions (i.e., in which AKC received income) were reported as positive values and debit transactions (i.e., outlays by AKC) were reported as negative figures, when the opposite is in fact correct. Torrington agrees with Koyo that the signs should be reversed for the final results.

**Department's Position:** Koyo's U.S. discount programs are equivalent to the company's U.S. post-sale billing adjustment as described by Koyo in previous reviews and we have determined to treat them in a consistent manner. Koyo's allocation of its discount program is based on the activity of its accounts during the POR as a whole. Therefore, we recognize that the company may receive net income from its discount programs during some



time periods within the POR due to the nature of the company's book keeping practice. This methodology is unavoidable since to do otherwise would result in constant adjustments to prices after the completion of a review. Therefore, we have accepted Koyo's allocation methodology as reasonable and have reversed the signs.

**Comment 18:** Torrington contends that the Department should correct the computer program and treat NSK's early payment discounts in the home market as an indirect expense. According to the preliminary analysis memorandum, it was the Department's intent to treat NSK's early payment discounts as indirect expenses.

NSK claims that its early payment discounts are paid according to a fixed and uniform schedule which was provided in its Section C responses. Discounts vary only according to days from the end of the month of shipment and the month in which payment was paid. Total discounts granted to each distributor are allocated to subject sales on a distributor-specific basis. NSK asserts that there is no meaningful distinction between distributor-specific discounts granted as a fixed percentage of sales and such discounts granted according to a fixed schedule of discount percentages. At issue, according to NSK, is whether such discounts bear a "reasonable direct relationship" to the sales in question. NSK cites *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed. Cir. 1983) and 19 CFR 353.56(a). NSK claims that it has demonstrated a direct relationship between early payment discounts and sales of the subject merchandise and should therefore be permitted a direct price adjustment.

**Department's Position:** The Department generally makes a direct selling expense adjustment for discounts reported on a transaction-specific basis. See Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 55 FR 18992, 19056 (1989). Since NSK allocated this expense on a customer-specific basis but did not link it to the specific sales under consideration so that its amounts could not be determined, we treated it as an indirect selling expense.

**Comment 19:** Federal-Mogul asserts that SKF-Italy's Cuscinetti division has overstated its cash discounts in calculating the claim by multiplying the discount rate applicable under the terms of payment given to each customer by the price and billing adjustments charged to the customer. This methodology overstates cash discounts

because it is based on the assumption that each customer offered discount payment terms qualified for a discount. Federal-Mogul adds that the record indicates that Cuscinetti's customer did not always pay early, and in certain instances, paid interest on late payments, as SKF reported in its interest revenue field. The Department should, therefore, reject Cuscinetti's claim for cash discounts.

SKF claims that the Department verified Cuscinetti's cash discount calculation methodology and that discounts were incurred and paid to the customers.

**Department's Position:** The Department agrees with Federal-Mogul. Because Cuscinetti claimed a cash discount on all sales that offered discount payment terms regardless of whether a discount was actually given, we have disallowed this claim for a cash discount.

**Comment 20:** Torrington argues that for purposes of the final results, SKF-Italy's claimed cash discounts to Industrie and Speciali should be disallowed in the calculation of home market price as SKF has failed to provide this information on an invoice- or customer-specific basis. Torrington argues that absent this information, SKF's claim remains unsupported by substantial evidence and, as a matter of administrative law, cannot support an administrative determination. Torrington cites section 1516a(b)(1)(B) of the Tariff Act to support this point. Referring to Final Antidumping Administrative Review: Certain Internal-Combustion, Industrial Forklift Trucks from Japan, 53 FR 12561 (1988) to support its position, Torrington states that, as a matter of law, the Department does not accept allocated discounts or estimated rebates in the home market which are not tied to the products or sales under consideration or where the allocation does not accurately reflect transaction-specific amounts. Further, Torrington asserts, granting a home market discount when not justified by the record undermines the discipline of the Department's method of obtaining information.

SKF-Italy argues that Torrington's assertion that certain of SKF's claimed expenses, specifically home market discounts, should be rejected because substantial evidence to support these claims is purportedly lacking, is without basis. SKF has been the subject of three exhaustive verifications since the beginning of the AFB dumping proceedings and the Department remains satisfied with its verifications of SKF. SKF asserts that Torrington's statement that the Department should

reject Industrie's and Speciali's claimed home market discounts is baseless, and citing to the Department's verification report, claims that the Department again verified Industrie's and Speciali's allocation methodology and the fact that the discounts reported were actually incurred and recorded in each company's accounting records. SKF urges the Department to allow the claimed home market discounts, consistent with its practice in the first review and to dismiss Torrington's unfounded comments.

**Department's Position:** We agree with Torrington. Because cash discounts were not reported on a transaction-specific nor customer-specific basis, we have rejected Industrie's and Speciali's home market discount claim.

**Comment 21:** Torrington maintains that the Department should use the highest cash discount rate for any SKF-Sweden and SKF-UK sale as BIA for the reported discount rate for all U.S. sales by CR Services since SKF did not report customer- and product-specific discount amounts for CR services. SKF contends that it reported all U.S. cash discounts on a transaction-specific basis for sales made by SKF-USA and MRC, but it was not feasible to do so for sales by CR Services. SKF maintains that its allocation of an average CR Service cash discount rate based upon actual discounts and financial records is reasonable and should be accepted. Moreover, SKF's methodology is reasonable because CR Service's role in this review is relatively insignificant and the company is not integrated into SKF's overall operations.

**Department's Position:** Because CR Services did not report its cash discounts on a transaction-specific, we have disallowed the cash discount claim as reported. As BIA, the Department has applied the highest discount rate offered in the terms of sale of SKF-USA for all CR Services sales.

**Comment 22:** Federal-Mogul claims that the Department's FMV calculation fails to deduct FAG-Italy's home market discounts "OTHDISE3" and "OTHDISE4," as reported in FAG-Italy's Section C response. These variables were also omitted from the adjusted price calculation used in the cost test.

FAG-Italy claims that the FMV and adjusted price calculations properly account for all home market discounts and that the confusion is due solely to FAG-Italy's inadvertent use of the wrong field names in its home market sales data tape.

**Department's Position:** The Department recognized FAG-Italy's inadvertent labeling error and has



properly deducted from FMV all of FAG-Italy's home market discounts, as reported on the home market sales data tape, and adjusted price calculations.

*Comment 23:* Federal-Mogul maintains that FAG-Italy reported in its narrative response that it did not have home market quantity discounts, yet its computer tape submission contained a variable for this expense. The Department should not adjust foreign market value for the amount reported under this unexplained variable.

FAG-Italy agrees with Federal-Mogul in that it does not grant quantity discounts in the home market. It does, however, grant four types of discount programs in the home market as described in its narrative response. The confusion stems from FAG's inadvertent error in placing these discount programs in the wrong computer fields.

*Department's Position:* We agree with FAG-Italy. The Department deducted FAG-Italy's discounts from foreign market value since it would be unfair to penalize FAG for a minor inadvertent error in the naming of variables in its tape submission. We have determined the underlying discount data to be reliable.

*Comment 24:* FAG-Germany maintains that the Department's preliminary results analysis memorandum indicated that certain of FAG's home market discount expenses were classified as indirect selling expenses because they were allocated only on a customer-specific and not a transaction-specific basis. FAG contends that the treatment of these expenses is in error since they were treated as direct selling expenses in the LTFV investigation and the first review. FAG has not changed its customer-specific allocation methodology since the two previous proceedings and the verification report for the current proceeding indicated that the Department did not find any discrepancies in the company's allocation methodology. Furthermore, if the Department had indicated during the course of this review that the Department intended to alter its previous treatment of certain of FAG's home market discounts, FAG might have been able to revise its allocation methodology in order to meet the Department's amended criteria. Moreover, the Department, in at least some respects, acknowledged the direct nature of FAG's discounts in adjusting the home market price for the COP test and in treating discount debit amounts which increased FMV as direct price adjustments. If the Department decides to continue to treat FAG home market discounts as an indirect selling expense,

it should, at a minimum, treat FAG's equalization discount as a direct selling expense because FAG only grants this discount to home market distributors and FAG bears this expense which would normally be assumed by FAG's home market distributors.

Torrington and Federal-Mogul argue that the Department acted consistently with its past practice in treating FAG-Germany's home market post-sale price corrections, price equalization and special discount programs as indirect selling expenses because the discounts were not linked to specific sales. See *Internal-Combustion Forklift Trucks from Japan*, 53 FR 12552, 12561 (1988).

*Department's Position:* The Department generally makes a direct selling expense adjustment for discounts allocated on a transaction-specific basis. See *Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 55 FR 18992, 19056 (1989). Since FAG-Germany allocated these home market discount expenses on a customer-specific basis but did not link it to the sales under consideration, we treated it as an indirect selling expense. Although we treated FAG's home market discounts as direct selling expenses in the previous review, this is a separate review and our decisions are based on the evidence on the record in the current review.

*Comment 25:* Federal-Mogul claims that SNR has unreasonably reported U.S. cash discount expense by allocating it over all sales even though the discount is only available to certain industrial distributors. Federal-Mogul contends that the Department should increase the cash discount rate to correct the understated rate.

SNR-USA states that it does know which of its customers are industrial distributors. However, SNR-USA points out that there is a price list with standard discount offers and that some distributors will not commit to purchasing the requisite amount to obtain a certain level of discount. Furthermore, the level of discount can be adjusted to reflect competitive conditions and a distributor can receive a retroactive discount based on past levels of purchases. Accordingly, SNR submits that dividing total discounts by total sales is a better calculation methodology to determine cash discounts.

*Department's Position:* We agree with Federal-Mogul. Since SNR did not identify the specific industrial distributors which received discounts, we have applied the reported cash discount rate granted to certain

industrial distributors to all distributors' sales as BIA.

#### 15. Circumstance-of-Sale Adjustments

##### A. Credit Expense

*Comment 1:* Torrington asserts that the Department correctly rejected NSK's claim for an adjustment to FMV for credit expenses because NSK did not report credit expense on either a transaction or customer-specific basis on HM sales. Torrington points out that NSK, in compliance with Department instructions, used a customer-specific credit rate for sales made in the United States. In addition, Torrington maintains that, in the interest of consistency, the Department should also reject NSK's credit expense deduction claimed for constructed value.

NSK contends that its computer records do not allow the company to calculate credit expense on a transaction- or customer-specific basis. NSK asserts that it has supplied detailed information to the Department on this adjustment and that an allowance for credit should be granted. NSK points out that it used a methodology identical to that used in previous reviews which has been verified and accepted by the Department. NSK cites *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 FR 18992, 19052 (May 3, 1989) and *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 57 FR 4954 (February 11, 1992).

*Department's Position:* As noted in the *Final Results of Administrative Review: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Republic of Germany*, 56 FR 31724 (July 11, 1991), the Department will not accept credit expenses not reported, at a minimum, on a customer-specific basis or some reasonable equivalent. In fact, the Department's preference remains for sales-specific reporting of this expense. NSK failed to report home market credit expense on a customer- or transaction-specific basis. Therefore, we have disallowed NSK's entire home market credit expense claim. As the best information available, we have allowed only the minimum credit expense adjustment based on the least favorable terms of payment to all home market customers. We have applied this reporting requirement consistently for all companies under review in these proceedings.



The information submitted by NSK for the calculation of constructed value credit expense was adequate and did not have to be submitted on a customer-specific basis. Therefore, we have allowed this adjustment.

*Comment 2:* Torrington asserts that because Koyo has not reported the actual date of payment for a portion of its HM sales, the Department should assign the most adverse date of receipt of payment for that portion of HM sales. In addition, Torrington agrees with the Department's preliminary decision to use the lower interest rate of the two reported by Koyo for inventory carrying cost and credit expense.

Koyo contends that the Department erred in using the interest rate reported for inventory carrying costs in the calculation of Koyo's HM credit expense. Koyo states that the interest rates reported for the two adjustments were appropriate and allowed for "apples to apples" calculations of each expense. Also, Koyo asserts its calculation of a customer-specific average date of payment using 90 percent of its sales is acceptable and accurate. Koyo points out that the identical methodology was accepted by the Department in the 1988-90 review of antifriction bearings.

*Department's Position:* Koyo calculated a customer-specific credit expense for its largest customers, which accounted for over 90 percent of its sales by volume, and applied the average term of payment to calculate credit expenses for the remaining 10 percent of sales. Although the Department's stated policy on the reporting of credit expense, if strictly interpreted, would seem to preclude our acceptance of Koyo's reported credit expense, in this case Koyo has employed a methodology that basically complies with our instructions and which we find to be a reasonable measure of Koyo's customer-specific payment terms. Our stated preference on the reporting of credit expense remains unchanged. See Final Results of Administrative Review: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Republic of Germany, 56 FR 31724 (July 11, 1991).

With respect to Koyo's two reported interest rates for credit and inventory carrying costs, we used the lower of the two for both expenses for the preliminary results. However, upon further consideration of all comments, we have decided that the two average short-term interest rates employed by the company in calculating these expenses are consistent with the time period concerned (Koyo's inventory

valuation periods differ slightly from the period of review) and accurately reflect both Koyo's cost of extending credit to its customers and holding goods in inventory. For these reasons, we have used Koyo's initial allocation methodology for both credit and inventory carrying costs for these final results.

*Comment 3:* Federal-Mogul contends that Meter's U.S. credit expense calculation should be adjusted to add a minimum of five additional days per sale to Meter's reported actual days between shipment and payment. Federal-Mogul argues that the addition of these days would account for a lag between Meter's invoicing date and the actual date of shipment to the customer. Federal-Mogul arrives at five days by estimating one day for invoicing and four days for shipping. Meter argues that its calculation of credit expense is consistent with Department practice. The inclusion of any additional days in Meter's credit expense calculation would include inventory carrying costs which is an indirect selling expense.

*Department's Position:* We disagree with Federal-Mogul. It is our practice to calculate direct credit expenses from date of shipment to date of payment. Meter has provided sufficient information regarding the calculation of credit expense. Therefore, we have found no reason to adjust Meter's reported credit expense.

*Comment 4:* Torrington argues that since SKF-Italy and SKF-UK did not provide date of payment information for U.S. export sales made by CR Services, the Department should resort to BIA. In this case Torrington argues that the Department should calculate credit expense for these sales on the basis of the longest actual time between shipment and payment for any SKF-U.S. sale.

SKF-Italy and SKF-UK argue that the Department should accept SKF's reliance on an average days outstanding which is calculated based on the company's business records. SKF asserts that such a methodology was used by SKF, in limited instances in the first review of AFBs, and was accepted by the Department.

*Department's Position:* SKF has provided credit expense information on sales made in the U.S. in accordance with our instruction for all but those sales made by CR Services. These sales constitute an insignificant percent of SKF's total U.S. sales. In our estimation, SKF has made a reasonable attempt to comply with our credit expense reporting requirements. Therefore, we have accepted SKF-Italy and SKF-UK's

reporting of U.S. credit expense for these final results of review.

*Comment 5:* Torrington contends that SKF-Sweden has been ambiguous in response to the Department's request for a detailed explanation of SKF's method of calculating average dates of payment for HM sales made by Steyr. Torrington contends that it is clear that SKF used an average date of payment methodology. However, it is unclear whether this average is customer-specific or across all sales. Absent SKF's clarification, Torrington submits that the Department should apply the shortest payment period on record for any SKF-Sweden home market sale.

*Department's Position:* The Department has indicated that it will not allow an adjustment for credit expense if it is not calculated on either a transaction- or customer-specific basis. See Final Results of Administrative Review: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany, 56 FR 31724 (July 11, 1991). However, in this case, SKF-Sweden has provided credit expense information on sales made in the home market in accordance with our instruction for all but a few sales made by Steyr, an SKF affiliate. In our estimation, SKF has made a reasonable attempt to comply with our credit expense reporting requirements. Therefore, we have accepted SKF-Sweden's reporting of home market credit expense for purposes of these final results of review.

*Comment 6:* Torrington states that the Department erred in accepting NTN-Japan's home market credit expense since that adjustment was inflated by the inclusion of compensating deposits. Torrington contends that we should either recalculate the expense or reject the adjustment.

*Department's Position:* We agree with Torrington that we should not accept NTN-Japan's credit cost calculation in light of the inclusion of compensating deposits. Therefore, in our final results we have recalculated NTN's credit costs based on the firm's net interest expense (interest expense minus interest income) as most representative of the firm's internal cost of funds. The recalculated expense forms the basis of the credit cost adjustment for both home market and U.S. purchase price sales. We consider this the proper methodology for the final results. See Final Results of Antidumping Duty Administrative Review: Antifriction Bearings from the Federal Republic of Germany, 56 FR 31721 (July 11, 1991).



## B. Commissions

*Comment 7:* Torrington contends that the Department should disallow home market commissions paid to purchasing agents of Koyo's customers, stating that these commissions are inconsistent with agency practice. Torrington cites *Industrial Phosphoric Acid from Israel*, 52 FR 25440, 25442 (July 7, 1987) in support of its claim that the buyer of a product cannot receive a commission for its own purchase.

Koyo asserts that the Department should continue to accept Koyo's commissions to purchasing agents because Koyo did not pay commissions to buyers as claimed by Torrington. Instead, Koyo paid commissions to purchasing agents.

*Department's Position:* We agree with Koyo. The information on record indicates that Koyo pays commissions to purchasing agents who act as resellers. In *Industrial Phosphoric Acid from Israel*, 52 FR 25440, 25442 (July 7, 1987), the Department states that "the buyer of a product cannot receive a commission for its own purchase, as would a sales agent." However, in this case, the purchasing agent is receiving the commission as a reseller, rather than a buyer, and thus this precedent does not apply. Therefore, we have allowed this adjustment to foreign market value for commissions paid to the purchasing agents of Koyo's customers.

*Comment 8:* Federal-Mogul disagrees with the Department's general treatment of all U.S. commissions as indirect selling expenses. Federal-Mogul argues that U.S. commissions should be broken into direct and indirect components, in order to reflect the actual nature of the expense. Only the indirect portion of the U.S. commission expense should be used to offset home market indirect selling expenses. Additionally, Federal-Mogul argues that the Department should deduct from USP all indirect selling expenses incurred in the home market on all commissioned U.S. sales regardless of whether they are ESP or PP sales. Federal-Mogul argues that those indirect selling expenses are analogous to the indirect selling expenses incurred in the home market for ESP sales.

*Department's Position:* In accordance with 19 CFR 353.56(a)(2), the Department makes a reasonable allowance for differences in commissions when commissions are paid in both the U.S. and home markets. We are only authorized to offset commissions paid in one market with indirect selling expenses from the other market in cases in which no commissions are paid in the other market. See Special Rule in 19 CFR 353.56(b)(1). There is no provision for

breaking out direct and indirect portions of U.S. commissions, and we have not done so in these reviews. This determination is in accordance with the Department's decision on the same issue in Final Results of Administrative Review; Television Receivers, Monochrome and Color, from Japan, 54 FR 165, 35520 (August 26, 1989).

*Comment 9:* Federal-Mogul asserts that SNR-USA's commission expense is grossly understated on relevant sales. Although SNR-USA reported a wide range of substantial commission rates, it reduced them considerably by allocating the expense over total sales. Federal-Mogul suggests that the Department change the value of the commission expense to the average percentage rate reported in SNR's supplemental response.

SNR counters that all expenses were accounted for in the response. The commissions were averaged over all sales because sometimes the unrelated sales representatives west of the Mississippi ship to the East Coast and SNR itself will ship west of the Mississippi. SNR maintains it does not have the capability to track this information on an individual basis.

*Department's Position:* We cannot see the relevance of SNR's argument that it has averaged its commission expense because the unrelated commissionaire might ship merchandise east of the Mississippi. Regardless of the destination of the merchandise the commissionaire will continue to receive a commission. Since the Department has access to the average commission paid to unrelated commissionaires, we have used this average percentage rate for the applicable commission expenses. We have excluded the amounts reported under commissions to related parties.

*Comment 10:* Torrington contends that the Department should deduct commissions paid by NTN-Japan to a related party from purchase price sales.

*Department's Position:* We disagree with Torrington. We consider related-party commissions as intra-company transfers of funds and, as such, not a proper adjustment to price.

## C. Advertising and Promotional Expenses

*Comment 11:* Federal-Mogul maintains that SKF-France, SKF-UK, and SKF-Italy have treated all U.S. advertising and promotional expenses as indirect, although, upon examination of submitted samples of U.S. advertising and promotional materials, some of these expenses are clearly direct. Federal-Mogul bases this argument on one of these samples, claiming that it promotes a specific SKF product.

*Department's Position:* The Department has examined the sample advertisement cited by Federal-Mogul and disagrees that it constitutes a direct advertising expense. The advertisement in question was not promoting a specific product in which SKF bearings were incorporated, but merely used these products as examples to demonstrate the general uses of SKF products.

*Comment 12:* Torrington contends that the Department should have classified FAG-Italy and FAG-UK's U.S. advertising and promotion expenses as direct, rather than indirect expenses, citing one of the sample advertisements that FAG submitted as promoting a specific product. Torrington further argues that the classification of all of FAG advertisements as indirect is questionable. Because FAG did not place all of its advertisements on the record, and the Department did not verify whether they were direct or indirect, Torrington asserts that all U.S. advertising expense should be treated as direct selling expenses unless proven otherwise.

*Department's Position:* For advertising to be treated as a direct expense, it must be incurred on products under review and assumed on behalf of the respondent's customer; that is, it must be shown to be directed toward the customer's customer. See Final Results of Antidumping Duty Administrative Review; Antifriction Bearings from the Federal Republic of Germany, 56 FR 31725 (July 11, 1991). The examples of U.S. advertising submitted by the respondent were not, in our judgment, directed toward the customer's customer, i.e., the end-user. Instead, FAG's U.S. advertising appears to be general in nature, and targets FAG's customer. The Department is not required to examine every document which may be related to a given adjustment. In addition, we are satisfied, based on the information which we requested pertaining to U.S. advertising, that FAG's U.S. advertising expenses are indirect in nature.

*Comment 13:* Torrington argues that the Department should disallow expenses that NMB/Pelmecc Singapore has classified as pertaining to instances where customers were taken on overseas trips because NMB/Pelmecc Singapore has failed to demonstrate the manner in which these trips are tied into home market sales. NMB/Pelmecc Singapore explains in its rebuttal brief that these expenses were incurred to promote MSB's local sales of M&I and Pelmecc ball bearings by showing MSB's customers the scale of the Minebea Group operations.



*Department's Position:* NMB/Pelmec Singapore stated in its supplemental questionnaire response that these sales promotion expenses were incurred to promote local sales. NMB/Pelmec Singapore allocated these expenses over the appropriate types of home market sales, and reported only the amounts allocated to Singapore-made subject merchandise. We find this methodology to be reasonable, and have accepted this adjustment for these final results.

*Comment 14:* Federal-Mogul contends that, in its preliminary margin calculations for Nankai, the Department erroneously excluded U.S. direct advertising expenses from the U.S. direct selling expenses variable. Nankai counters that the advertising expenses incurred in the U.S. market are similar in nature to those indirect advertising expenses incurred in the home market and, therefore, should be classified similarly. If the Department decides to classify the U.S. advertising expenses as direct selling expenses, Nankai argues the same classification should be given to home market advertising expenses.

*Department's Position:* Nankai reported all of its home market and U.S. advertising expenses as direct selling expenses. The home market advertising expense consisted of a product catalog plus two other expenses. In the U.S., the only advertising expense incurred was for the same product catalog used in the home market. At verification, we found that the product catalog was directed at Nankai's customers, rather than at Nankai's customers' customers. Therefore, the Department properly classified it as an indirect selling expense. See Final Results of Antidumping Duty Administrative Review; Antifriction Bearings from the Federal Republic of Germany, 56 FR 31725 (July 11, 1991). Since we determined the product catalog expense in the home market to be indirect in nature, we treated the same expense in the U.S. to be an indirect advertising expense.

*Comment 15:* Torrington argues that Koyo has not provided detailed information to support its claim that its advertising and sales promotion expenses should have been classified as indirect selling expenses and, therefore, absent convincing evidence to the contrary, the Department should treat these expenses as direct selling expenses.

*Department's Position:* Koyo provided examples of its advertising and sales promotions, which the Department examined. Contrary to Torrington's assertion, Koyo explained, and provided examples of, the types of expenses that compose its claimed advertising and

sales promotion expenses. Based on our examination of these data, we conclude that the expenses were correctly classified as indirect.

*Comment 16:* Federal-Mogul contends that the direct and indirect U.S. advertising and sales promotion expense information submitted by SNR-U.S. is inadequate and inconsistent, and urges the Department to, at a minimum, revise these expenses to reflect the percentage factor that was submitted in the supplemental response, rather than the percentage factor from the original response, which was used in the preliminary results.

*Department's Position:* We agree with Federal-Mogul and have used the higher percentage factor for our final results.

#### D. Technical Services and Warranty Expenses

*Comment 17:* RHP objects to the Department's decision to treat technical service expenses as direct expenses for USP purposes and indirect expenses for FMV purposes. RHP states that the Department should only consider technical services direct selling expenses if these expenses are directly related to sales. See Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan; Final Results of Antidumping Duty Administrative Review, 55 FR 38720, 38722 (September 20, 1990), at Comments 16, 21, and 36; Certain Internal-Combustion, Industrial Forklift Trucks from Japan, 53 FR 12552, 12563 (April 15, 1988). RHP claims that it does not maintain any records concerning technical service expenses that allow it to tie the expenses directly to particular products, customers, or markets. Therefore, RHP reported these costs in both markets as indirect selling expenses. Accordingly, as in the initial investigation and the first administrative review, the Department should treat technical services as indirect expenses in both the United States and the home market.

*Department's Position:* In the questionnaire, the Department requested that respondents separate technical service expenses into direct and indirect portions. Since RHP could not distinguish between the direct and indirect portions of this expense in either market, we used the best information otherwise available and considered the entire U.S. technical service expense as direct and the entire home market amount as an indirect expense.

*Comment 18:* Torrington asserts that Koyo allocated U.S. technical service expenses over all sales, apparently including after-market sales. Ordinarily,

technical service expenses are incurred in providing installation assistance to OEMs and have no application to after-market sales. In addition, Koyo failed to document the extent to which the alleged technical services expenses differed between the two levels of trade.

*Department's Position:* Koyo has stated that it provides technical services to all customers that request assistance, including after-market customers. Absent compelling evidence to the contrary, we are satisfied that Koyo's allocation methodology for technical service expense is reasonable.

*Comment 19:* Federal-Mogul argues that FAG-Italy and FAG-UK incorrectly claimed a direct deduction from home market price for technical services and warranty expenses which were allocated over all of FAG-Italy's HM sales. Federal-Mogul argues that for purposes of the final results, FAG's technical service and warranty expenses should be treated as indirect selling expenses.

*Department's Position:* Based on our verification of FAG-UK's technical services and warranty expenses in this review, and our past verifications of FAG, we continue to believe that these expenses have been reasonably quantified and allocated and are properly deductible as direct selling expenses. See Final Results of Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany, 56 FR 31723 (July 11, 1991).

*Comment 20:* Federal-Mogul argues that the Department should not allow FAG-UK and FAG-Italy to use a 40-month average percentage factor based on corresponding sales during that period for U.S. direct warranty expenses when an amount based solely on the period of review is available.

*Department's Position:* We agree with Federal-Mogul. We prefer to use expenses incurred during the period of review. However, the Department has quantified FAG-UK and FAG-Italy's actual U.S. warranty expenses incurred during the period of review, and determined that the difference between the amount reported by FAG-UK and FAG-Italy and the actual U.S. warranty expense is so insignificant that the change the factor used in the preliminary results would have no effect on either FAG-UK or FAG-Italy's final margin.

*Comment 21:* Federal-Mogul claims that Meter failed to include all expenses incurred in its deduction of warranty costs from U.S. price. Federal-Mogul argues that the costs of in-house labor and factory overhead which were



excluded by Meter should also be deducted as part of the U.S. warranty expenses adjustment. In addition, Federal-Mogul argues that Meter did not include all costs associated with reworked parts. Federal-Mogul maintains that, in the past, the Department has considered such expenses indirect selling expenses because they were assumed by a separate, permanently operating, department or related company, and reflect a normal part of the operations of and cost to the company. In Meter's case, Federal-Mogul contends that, even though the re-working was performed in-house, "it was not performed by a service or repair department or related company," but, rather, it was performed by employees who were not accustomed to performing such work, and therefore, constituted additional work on their part beyond their normal duties.

**Department's Position:** We agree with Federal-Mogul. It is the Department's long-standing practice to treat in-house warranty labor expenses as indirect selling expenses. See *Color Television Receivers from the Republic of Korea*; Final Results of Antidumping Administrative Review, 55 FR 26225, 26230 (June 27, 1990). The fact that Meter did not have a special unit to handle its repair work is irrelevant. Meter's workers were still paid whether they performed warranty work or not. Therefore, we have continued to treat the in-house labor and factory overhead warranty expense as an indirect expense.

**Comment 22:** Federal-Mogul objects to the methodology used by Meter in making post-verification home market warranty corrections to the direct selling expense variable (This variable is composed of two expenses: warranty expense and credit expense). Federal-Mogul asserts that the constructed value verification report indicates that Meter calculated its per-unit warranty expense based on its full warranty cost, rather than solely the portion of the warranty cost associated with home market sales. They state that the report also indicates that the per-unit warranty expense would be revised to reflect only those warranty costs associated with the home market. Federal-Mogul alleges that the revised direct selling expense variable increased on some transactions, while decreasing on others. Federal-Mogul contends that it is illogical for such a revision to warranty expense to have resulted in this inconsistency. Either the revision of the per-unit warranty expense was not performed correctly, or the credit expense component of the direct selling

expense variable was altered without justification.

Meter argues that, at verification, the Department requested the firm to reallocate its warranty expenses so that the direct warranty expenses variable would reflect only those expenses incurred in the home market. Meter asserts that it complied with this request. Meter contends that its home market warranty expense calculations are accurate, and that no other changes were made to the direct selling expenses variable. Meter explains that the fluctuations that resulted from revising the direct selling expense variable were caused by changes to the cost of manufacture variable. Because direct selling expenses were calculated as a percentage of the cost of manufacture, the direct selling expense variable also was affected, resulting in increases and decreases in the values of that variable.

**Department's Position:** We agree with Meter. Per-unit warranty expense was measured as a percentage of the cost of manufacture. Therefore, any changes in this variable automatically caused fluctuations in Meter's per-unit warranty expense. At verification, the Department requested a number of revisions which affected the cost of manufacture: transportation costs were added to materials; technical labor for tooling was moved from SG&A to overhead; an overstatement of expenses for fuels and lubricants had to be corrected; allocation of medical and pharmaceutical costs, which had been allocated in total to overhead, had to be reallocated so that a portion was allocated to administrative personnel; costs associated with small asset purchases and water were added to overhead; per-unit warranty costs, which had been based on total warranty costs, were revised to reflect home market warranty costs, etc. As a result of these changes, variances occurred in the per-unit warranty expense. Therefore, we have decided to accept Meter's home market direct selling expense totals, as corrected after verification.

**Comment 23:** Torrington claims that the Department should reclassify Koyo's indirect U.S. warranties, guarantees, and servicing expenses as presumptively direct selling expenses unless Koyo can prove otherwise.

**Department's Position:** We disagree with Torrington. We have examined Koyo's reported U.S. warranty, guarantees and services and have determined that these expenses were correctly reported as indirect selling expenses. Therefore, we have accepted Koyo's reporting of this expense.

**Comment 24:** Koyo maintains that the Department should not deny its claim for negative indirect warranty expenses incurred by AKC and negative export selling expenses (direct warranty expenses incurred by Koyo on behalf of sales to the United States). Koyo states that some warranty expenses incurred by AKC are charged back to Koyo. After recording it as an AKC incurred expense, AKC is reimbursed by Koyo. If AKC's warranty expenses for any given period are less than the reimbursements it receives for expenses in the previous period, the result is a negative expense. Koyo argues that it reported negative direct warranty expense incurred in the home market on behalf of U.S. sales because it reported a large warranty expense for the first review. Subsequently, this warranty was settled on different terms and Koyo adjusted for the reduction of this expense in its financial documents during the current review period.

**Department's Position:** For the final results, we have denied Koyo's negative warranty expenses. Koyo failed to document and explain the type of indirect warranty expense AKC would be reimbursed for by Koyo. We denied the company's negative warranty expenses associated with sales to the United States because the amount reported by Koyo does not reflect actual expenses incurred during the period of review.

**Comment 25:** Torrington states that SKF-Sweden did not separately identify warranty expenses for this review because of the significant time it would take to conduct an analysis of these expenses and because such expenses are historically legally *de minimis*. Since indirect U.S. selling expenses are subject to offset in the home market, Torrington argues that the Department should be sure that direct warranty expenses are not being reported as indirect.

**Department's Position:** We agree with Torrington that it is not up to the discretion of the respondent to determine whether or not an expense is legally *de minimis*. We have, therefore, recorded the warranty expense, originally reported as indirect, as a direct expense and reduced indirect selling expenses accordingly.

**Comment 26:** Torrington contends that the Department failed to account for additional warranty and technical service expenses incurred by Nachi's technical service center in the United States. Torrington reasons that although the expenses incurred by this center are paid by Nachi in Japan, some portion of



the expenses incurred by this center must be attributed to U.S. sales.

**Department's Position:** We disagree with Torrington. Nachi has reported, and the Department has deducted, indirect expenses incurred by Nachi's technical service center which are attributable to U.S. sales.

**Comment 27:** Federal-Mogul asserts that SNR-USA reported fringe benefits, but failed to include them in U.S. technical service expenses. The Department should adjust this expense to reflect the ratio of salary and travel expenses of the technician plus the previously omitted fringe benefits to total sales value.

**Department's Position:** We agree with Federal-Mogul and have included the fringe benefits in our final results.

**Comment 28:** Although SNR-USA originally alleged that its U.S. direct warranty expense was too insignificant to report, Federal-Mogul points out that SNR did report an amount for direct warranty in its supplemental response which generates an adjustment factor larger than the factors reported for some other items. Accordingly, Federal-Mogul believes the Department should include this amount in its final results.

**Department's Position:** We agree with Federal-Mogul and have included the reported direct warranty expenses in our final results.

#### E. Inventory Carrying Costs

**Comment 29:** Torrington argues in its general issues brief that the Department erred by deducting inventory carrying costs directly from FMV. Torrington, citing the CIT's ruling in *Daewoo Electronics Co., Ltd. v. United States*, 712 F. Supp. 931, 950 (CIT 1989), contends that pre-sale expenses incurred in the home market and the United States should be treated differently in order to make a fair comparison. Therefore, according to Torrington, inventory carrying costs which are deducted directly in ESP calculations, should be classified as indirect selling expenses when calculating FMV since they do not relate to particular sales. Torrington further argues in its country-specific briefs that the Department should make no deduction from FMV for this imputed general expense.

**Department's Position:** We disagree with Torrington. We did not treat inventory carrying cost as a direct selling expense in the preliminary results. The Department has determined previously, and continues to maintain, that inventory carrying costs are properly classified as indirect selling expenses since they do not relate to particular sales. See Final Results of

Antidumping Duty Administrative Review; Color Television Receivers Except for Video Monitors, from Taiwan, 55 FR 47093, 47098 (November 9, 1990). The nature of this expense, and therefore its classification, holds true regardless of the market in which it was incurred. Second, as we stated in the original investigation and first administrative review of this proceeding, in order for comparisons to be fair, it is necessary to make inventory carrying cost adjustments to both FMV and USP. See Final Determination of Sales at Less than Fair Value; Antifriction Bearings and Parts Thereof, From the Federal Republic of Germany, 54 FR 19050 (May 3, 1989); Final Results of Antidumping Duty Administrative Review; Antifriction Bearings and Parts Thereof, From the Federal Republic of Germany, 56 FR 31727 (July 11, 1991). That the foreign seller chooses to sell from inventory in the home market is no different from the seller's decision to undertake ESP transactions in the United States. Because the seller incurs the opportunity cost of holding inventory in both markets, and because we adjust for that cost in the U.S. market, we must also adjust for the same cost in the home market. The case cited by Torrington, *Daewoo Electronics Company vs. United States*, concerns whether the Department properly made an adjustment to ESP for certain pre-sale credit expenses, not with whether an adjustment to FMV for inventory carrying costs is appropriate.

**Comment 30:** Torrington contends that the Department should reject NSK, NTN, and Nachi's submission of Japanese short-term interest rates to calculate U.S. inventory carrying costs. Torrington argues that the Department should not accept the use of the Japanese interest rate simply because the Japanese parent's repayment terms were longer than the average inventory period. Torrington alleges that the Department errs when it measures the actual cost to the corporation as a whole rather than the cost that would have been incurred had the importer been unrelated and purchased the goods FOB Japan. Torrington further argues that Nachi failed to demonstrate that its U.S. subsidiary had access to loans at the Japanese short-term interest rate.

**Department's Position:** We disagree with Torrington. In the case of NSK and NTN, the terms of payment between the parent and the subsidiary are longer than the average days the merchandise remains in the subsidiary's inventory. Therefore, NSK and NTN used the short-term interest rate available to the parent for their entire calculation of their U.S. subsidiary's inventory carrying costs.

Nachi calculated its inventory carrying costs by using the parent's short-term interest rate only for the period of time covered in the terms of payment from its parent. Nachi used the U.S. subsidiary's short-term interest rate to calculate its cost of carrying inventory beyond the parent's terms of payment.

Normally, the Department calculates U.S. inventory carrying costs using the U.S. interest rate because the U.S. subsidiary bears the full cost of carrying the merchandise. However, if the payment terms that the parent extends to the subsidiary, in combination with the time the merchandise remains in the subsidiary's inventory, indicates that the parent bears the cost of carrying the merchandise for a portion of time the merchandise is in inventory, then the parent's short-term interest rate is used to calculate that portion of the inventory carrying cost. Therefore, we will continue to accept NTN, NSK, and Nachi's calculation of inventory carrying costs for these final results. See Final Determination of Sales at Less than Fair Value; High Information Content Flat Panel Displays and Display Glass Thereof from Japan, 56 FR 32399 (July 16, 1991); Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan, 56 FR 65236 (December 16, 1991), 57 FR 4984 (February 11, 1992).

#### F. Indirect Selling Expenses

**Comment 31:** Federal-Mogul questions FAG-Italy's failure to report foreign indirect selling expenses for U.S. sales.

Federal-Mogul asserts that some department, office, or persons in Italy must be involved in the movement of bearings from Italy to Germany prior to sale in the U.S. In addition, Federal-Mogul contends that FAG-Italy has overstated HM indirect selling expenses by including expenses incurred in Germany to support all European sales and FAG's worldwide sales. Federal-Mogul asserts that FAG's sales in Italy do not go through Germany enroute to the customer. Accordingly, any expenses incurred in Germany for non-Italian sales should not be included in HM indirect selling expenses.

FAG-Italy states that it incurs no indirect selling expenses for products shipped to its German parent which are later sold in the U.S. FAG's ordering process for its worldwide sales is centralized in Germany. FAG asserts that any costs incurred on these transfers are included in FAG's reported COM. Any movement charges incurred are reported as such in the sales



sections of FAG-Italy's response. Regarding HM indirect selling expenses, FAG explains that certain costs incurred for sales in Italy are incurred by FAG-Italy's parent in Germany. FAG-Germany maintains a worldwide marketing staff, whose costs constitute an indirect selling expense.

**Department's Position:** We agree with FAG-Italy. We verified FAG-Italy in the first administrative review and found its reporting of indirect selling expenses to be reasonable and accurate. In this current review of AFBs, we verified FAG-Germany's home market indirect selling expenses and determined that the allocation methodology reasonably captured indirect selling expenses incurred on sales of the subject Italian merchandise. Therefore, we have used the indirect selling expense data as reported for these final results.

**Comment 32:** SKF-France claimed two levels of indirect selling expenses for SOS, a related selling company in the home market. The first level of selling expense reflects that portion of selling expenses incurred by the SKF manufacturing companies which, according to SKF, incur indirect selling expenses associated with its sales to SOS. The second level of indirect selling expenses were indirect selling expenses incurred by SOS on sales to unrelated parties.

SKF-France asserts that the Department erred in its rejection of the first level of selling expenses incurred on home market sales by SOS in the preliminary results of review. SKF points out that SOS's sales to unrelated customers include the manufacturer's selling expenses in the price, and that identical selling expenses are incurred regardless of the relationship between SKF-France and its customers. SKF-France cites *Brother Indus. Ltd. v. United States*, 540 F. Supp. 1341 (CIT 1982) and *Smith Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983). In addition, SKF-France notes that expenses incurred on sales to SOS are included in the numerator used for SKF-France's HM indirect selling expenses calculation. Likewise, sales made to SOS by SKF-France are included in the denominator of the HM indirect selling expense equation.

Federal-Mogul asserts that not only should the Department disallow the first level of selling expenses claimed on sales from SKF-France to SOS, but that, in light of the assertions made by SKF-France regarding the inclusion of sales from SKF-France to SOS in the calculation of all indirect selling expenses, the Department should reject HM indirect selling expenses claims as an adjustment to non-SOS sales as well.

**Department's Position:** The Department has disallowed SKF-France's "first-level" selling expenses, because they include the indirect selling expenses of the SKF manufacturing companies incurred on sales made between SKF and SOS, a related company. Since we are comparing U.S. sales to SKF manufacturing companies' sales to their unrelated customers or to SOS's sales to its customers, the Department only considers the indirect selling expenses incurred which support SKF's external sales and not sales made to SOS. Therefore, the Department disallowed the "first-level" of indirect selling expenses claimed by SKF on behalf of SKF's wholly-owned subsidiary, SOS. See Final Results of Antidumping Duty Administrative Review: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany, 56 FR 31692 (July 11, 1991).

Because the SKF-France companies included sales to SOS in their calculation of indirect selling expenses, we have reduced the home market selling expense totals by class or kind on the basis of the ratio of related-party sales to total sales as reported in the Section A home market response.

**Comment 33:** Federal-Mogul contends that SKF-Germany, the SKF-UK and SKF-France erroneously included direct selling expenses in U.S. indirect selling expense totals which have been offset by indirect selling expenses incurred in the home market. Federal-Mogul alleges that SKF included technical and advertising expenses which are directly related to sales made in the United States. Federal-Mogul argues that rather than allow these expenses as U.S. indirect selling expenses, the Department should consider SKF's claimed indirect selling expenses to be directly related to its U.S. sales.

SKF-Germany, SKF-France, and SKF-UK reject Federal-Mogul's assertion. SKF submits that its advertisements broadly promote SKF products and are general in nature. SKF further contends that technical expenses incurred on sales of AFBs are legally *de minimis* whether considered to be directly or indirectly related to sales. SKF-France asserts that the Department verified SKF's warranty expenses and also found them to be *de minimis*. Therefore, SKF concludes that there is no validity to Federal-Mogul's argument regarding SKF's U.S. indirect selling expenses.

**Department's Position:** Because the SKF companies have improperly included direct warranty and technical service expenses in their pool of indirect selling expenses, the Department has used the weighted-average technical

services and warranty expenses from the response of Bearing Industry, Bearing Services and Specialty Bearings, SKF-U.S. companies, as the best information available for these expenses. We deducted the weighted-average amount directly from USP.

**Comment 34:** SKF-UK and SKF-Germany assert that credit and inventory carrying costs should be included in the pool of indirect selling expenses to be deducted as an offset to U.S. indirect selling expenses and commissions.

**Department's Position:** We agree. Since the imputed interest expenses are indirect selling expenses, the expenses were included in the ESP offset for these final results.

**Comment 35:** RHP reported other indirect selling expenses as a percentage of sales price. One percentage factor was determined for sales made in 1990; another was determined for sales made in 1991. RHP, in its supplemental response, reported that the 1990 percentage factor was overstated and requested that the Department make the appropriate correction. Federal-Mogul contends that the Department, in making this adjustment, inadvertently made the same adjustment to the percentage factor for 1991 sales and requests that the Department correct this mistake. Federal-Mogul further contends that RHP's other indirect selling expenses variable for 1990 was originally understated by an amount even greater than the overstatement claimed by RHP. The reason for this understatement is the omission from the total 1990 indirect expense of the sum paid as Founder's Share.

RHP counters that it did, in fact, include the Founder's Shares in the 1990 expenses, explaining that the confusion may stem from the fact that the Founder's Share line item in 1990 resulted as a net credit, rather than a net charge.

**Department's Position:** The Department agrees that no adjustment should have been made to the indirect selling expense factor for 1991 sales. As for Federal-Mogul's claim that RHP's 1990 other indirect selling expenses variable was understated, the Department agrees. Although RHP recorded an adjustment for Founder's Share expenses which resulted in a net credit during 1990, that adjustment was not related exclusively to sales during the period of review and consequently distorted the actual Founder's Share expenses incurred on sales made during the POR. As the best information available, we disregarded the



downward adjustment to indirect selling expenses claimed by RHP.

**Comment 36:** Torrington asserts that the Department should not have included, as part of NSK's home market indirect selling expenses, those expenses incurred by its Business Integration Department, noting that NSK has conceded that these expenses are not solely related to domestic sales. Torrington maintains that these expenses should be allocated to total sales, not just to home market sales, thus allowing for an adjustment to both foreign market value and U.S. price. Torrington notes, however, that these expenses cannot be segregated by market and, therefore, recommends that the Department reduce the indirect selling expense total by the amount indicated as the Business Integration Department expense.

NSK counters that the Business Integration Department is responsible for determining when products ordered by domestic sales branches will be available for shipment and, therefore, it is a component of the home market sales process. The Department should, therefore, continue to treat this entire expense as part of home market indirect selling expenses.

**Department's Position:** The Department agrees that it cannot be determined whether expenses incurred by the Business Integration Department were associated solely with home market sales.

Therefore, we reallocated this expense by applying a ratio. For the home market expense we used a ratio of home market sales to total sales. For the U.S. expense, we used a ratio of export sales to total sales. The resulting changes are *de minimis*, so no computer programming changes have been made.

**Comment 37:** Torrington alleges that Koyo was unable to demonstrate that each of the expenses reported as "other indirect selling expenses" was limited only to home market operations. Torrington questions, for example, whether "salaries and wages," "benefits and directors fee" and "traveling expenses" should be allocated only to home market sales.

**Department's Position:** Based on our analysis, we are satisfied that the adjustment used for the preliminary results accurately reflects the indirect selling expenses incurred by Koyo in the home market. Accordingly, we have made no change for the final results.

**Comment 38:** Torrington argues that Koyo's home market doubtful debt expense was correctly not deducted from indirect selling expenses. They argue that the doubtful debt claim is actually not an expense at all, but rather

a reserve account established in the event that Koyo incurs a future expense for bad debts. Torrington argues that for the final results, the Department should continue to exclude any allowances for doubtful debt.

Koyo's claimed provision for doubtful debt has not been verified and linked to the company's history of bad debts and, therefore, might be overstated. Although Koyo claims that the Department accepted a similar allowance for U.S. sales, Koyo's response for U.S. indirect selling expenses does not contain a separate listing for bad debt. Moreover, Torrington asserts that Koyo's citation of *AOC Intern. Inc. v. United States*, 722, 721 F. Supp. 314, 319 (CIT 1989) does not support the company's claim for an adjustment for doubtful debt. In that case, the respondent substantiated its claim for an adjustment for doubtful debt by tracing bad debt losses incurred during the review period to specific products and bankrupt customers. In this review, Torrington claims that Koyo has neither traced its bad debt losses to specific products and customers, nor has it tied the reserve amount to the period of review, or another suitable time period.

Federal-Mogul contends that Koyo admits that its provision for doubtful debt is not an expense, but rather a reserve amount created in the event that the company would incur any future expense for bad debts. Since provisional or reserve accounts, by definition, cannot be construed to be incurred expenses, the Department should continue to delete this expense from Koyo's home market indirect selling expenses. Further, Federal-Mogul contends that the Department should continue to accept Koyo's U.S. indirect selling expenses as reported because there is no evidence on the record that this expense contains any amount for doubtful debt, or in the case that it does, that it is only provisional.

Koyo maintains that its allocation of indirect selling expenses for home market sales was verified in the first review and accepted for the preliminary results. Koyo states that Torrington has not provided any evidence that Koyo's allocation methodology is improper. Koyo claims that the Department's disallowance of the home market provision for doubtful debt is contrary to judicial precedent as well as the Department's practice in previous reviews involving Koyo. Moreover, Koyo asserts that a similar provision was accepted for U.S. sales in order to insure an "apples-to-apples" comparison in *Smith-Corona Group, Consumer Prod. Div., SCM Corp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983). Finally,

the CIT, in *AOC Int'l. Inc. v. United States*, 721 F. Supp. 314 (CIT 1989), and *Daewoo Electronics Co. v. United States*, 712 F. Supp. 931 (CIT 1989). Therefore, Koyo argues that the Department should accept an allowance for doubtful debt as a selling expense.

**Department's Position:** We disagree with Koyo. The Department considers bad debt that is actually incurred on the sale of subject merchandise during the period of review to be either a direct or indirect selling expense depending on the relationship between the bad debt expense and the sale. See *Color Television Receivers From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 56 FR 12705 (March 27, 1991). However, in this case, Koyo has claimed an amount in a reserve account which is set aside in the event that an actual expense is incurred. Koyo has shown no relationship between this account and actual sales. Therefore, we have disallowed Koyo's doubtful debt expense for these final results.

#### G. Hedging

**Comment 39:** Federal-Mogul argues that the adjustment to USP granted by the Department to FAG-Germany, FAG-Italy, and RHP-UK for gains and losses obtained by hedging exchange rates is unlawful and should be deleted from the programming instructions. Federal-Mogul asserts that hedging relates to a currency transaction, not to a merchandise sale. Federal-Mogul adds that although a respondent may take into account its expected hedged exchange rate in deciding the price at which AFBs are sold in the U.S., hedging does not change the fact that the U.S. dollar price is a dollar price which does not change when the proceeds are converted into foreign currency at a hedged rate. Thus, Federal-Mogul contends that hedging has no effect on statutory USP and that gains and losses produced by currency market speculation are not included in any of the provisions governing adjustments to USP. Federal-Mogul concludes that the antidumping law is not concerned with what a respondent does with the revenues from a sale; it is concerned with the price of the sale.

In the case of NWG, Federal-Mogul argues that the Department correctly disallowed the claimed hedging adjustment because, in addition to the reasons stated above, NWG's claim was based upon aggregations over the entire POR rather than the hedged rate relevant to specific sales. Therefore, on the basis of NWG's quantification methodology, Federal-Mogul asserts that



the Department should continue to disallow the adjustment.

FAG-Germany and FAG-Italy argue that in the first administrative review, the Department granted a circumstance-of-sale adjustment not as a compensation for fluctuating exchange rates, but as an adjustment for gains and losses due to hedging operations which were tied directly to U.S. prices. They assert that the Department determined and verified in both the first and second reviews that FAG's hedging produced an exchange rate that directly influenced the resale price of AFBs sold in the U.S. Thus, they contend that hedging gains and losses directly affect USP.

RHP also asserts that its hedging transactions related directly to sales of subject merchandise in the U.S. RHP argues that it has a legitimate interest in using hedging operations to control the risk of exchange rate fluctuations. RHP states that it enters into exchange rate contracts only because it sells subject merchandise in the U.S., and that, therefore, gains and losses on its hedging operations reflect a cost of doing business in the U.S. Furthermore, RHP reasons that by engaging in hedging operations, it altered the return on its U.S. sales relative to those made in the home market. In conclusion, RHP asks the Department to follow its practice from the first review and continue to adjust USP for hedging gains and losses.

NWG also notes that the Department has consistently accepted the hedging adjustment where the exchange rate contracts were directly tied to sales of covered merchandise. NWG states that for its ESP sales, the importing company, RHP Bearings, Inc., engaged in forward currency hedging. (NWG exports its AFBs to the U.S. via its parent company, RHP-UK, and sells them through RHP Bearing, Inc.) NWG asserts that the Department accepted and used this same RHP hedging data and methodology in the preliminary results for RHP-UK. Therefore, NWG requests that the Department adjust NWG's margin for currency hedging in the final results.

**Department's Position:** In the first review, the Department found that if a respondent "clearly demonstrated . . . that, through the use of forward markets, it received different amounts for its U.S. sales than our calculations would normally indicate, it is appropriate for the Department to take this action into account," because "[f]orward markets are clearly a tool that businesses can use to insure the actual return they receive on their sales." Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts

Thereof From the Federal Republic of Germany; Final Results of Antidumping Administrative Review, 56 FR 31726 (July 11, 1991). The Department also ruled that "[t]o demonstrate that hedging has affected the actual exchange rate that it has received for its sales, a respondent must show . . . the actual exchange rate contracts that it entered into and demonstrate that these contracts are tied directly to the sales made during the period of review." *Ibid.* Accordingly, in these reviews, the Department made adjustments for hedging gains and losses where respondents have shown that these gains and losses are tied directly to sales of covered merchandise during the second review period.

We verified the actual forward exchange rates reported by FAG-Germany and FAG-Italy for 1990 U.S. sales and determined that the exchange rate contracts were directly related to the reported U.S. sales. We did not conduct a verification of information submitted by RHP. However, RHP's questionnaire response did provide sufficient information to support a conclusion that its hedging contracts were directly related to its U.S. sales.

NWG reported the same hedging data and methodology that was reported by RHP and accepted by the Department. However, it is unclear from NWG's questionnaire response how RHP's hedging activities, in dollars and sterling, allowed NWG to insure its actual returns in German marks. Furthermore, in its response to the supplemental questionnaire, NWG stated: "The timing for forward purchases is arranged due to movements in the currency market and is wholly unrelated to specific customer orders or sales." NWG Response to Supplemental Questionnaire, November 22, 1991, at 8; emphasis added. The Department only adjusts for hedging gains and losses that are directly tied to specific sales of covered merchandise that we reviewed. Therefore, the Department did not use RHP's hedging gains and losses in the calculation of NWG's final margins.

**Comment 40:** Torrington argues that the Department should adjust NMB/Pelmec Singapore's USP for the total amount of gains and losses due to currency hedging. Torrington contends that the Department should not accept NMB/Pelmec's allocation of a portion of these gains and losses to other products because the allocations to certain other types of merchandise have not been supported.

NMB/Pelmec Singapore argues that it has properly allocated its foreign exchange contract losses based on the ratio of its sales branch's sales of AFBs

to the United States over the value of the sales branch's total U.S. dollar sales of all products.

**Department's Position:** NMB/Pelmec Singapore's related sales agent, Minebea Singapore Branch (MSB) entered into currency exchange contracts during the POR for portions of the excess U.S. dollar accounts receivable over U.S. dollar accounts payable. The U.S. dollar accounts include sales of subject and non-subject merchandise, and the portion of those accounts which are hedged is based on the discretion of MSB's management. The contracts are not transaction-specific, and cannot be traced to specific sales. In response to the Department's supplemental questionnaire, NMB/Pelmec developed an allocation methodology for its gains and losses based on sales value of each component of the U.S. dollar accounts. Because the reported gains and losses cannot be directly tied to U.S. sales, we did not adjust USP.

#### H. Antidumping and Legal Expenses

**Comment 41:** Federal-Mogul asserts that the Department should deduct respondents' antidumping-related legal expenses and estimated antidumping duties from ESP. Federal-Mogul argues that, under the statute, there is no rational basis for not deducting from ESP the amount of antidumping-related legal expenses, when all other legal expenses are routinely removed from ESP.

INA, NSK, and FAG reject this suggestion based on the Department's rejection of Federal-Mogul's argument on several occasions. See *Color Television Receivers from the Republic of Korea*; Final Results of Antidumping Administrative Review, 56 FR 12761, 12703 (March 27, 1991). FAG and NSK argue that the Department does not consider the duty deposits referred to by Federal-Mogul to be related to the sales of merchandise during the POR; thus they are not deductible from U.S. price. In *Daewoo Electronics Co., Ltd. v. United States*, 712 F. Supp. 931, 947 (CIT 1989), the Court held that:

Legal fees do not qualify as selling expenses, and that it would also be against public policy to make an adjustment for legal fees in calculations of dumping margins. Such practice would create artificial dumping margins and might encourage frivolous claims in order to incur legal fees which would result in increased margins.

**Department's Position:** We disagree with Federal-Mogul. The Department's consistent practice has been not to deduct from ESP antidumping-related



legal expenses or antidumping duty expenses. See Final Results of Antidumping Administrative Review; Television Receivers, Monochrome and Color, from Japan, 54 FR 13917 (April 6, 1989); Final Results of Antidumping Administrative Review; Television Receivers, Monochrome and Color, from Japan, 54 FR 26225 (June 27, 1990); Final Results of Antidumping Administrative Review; Color Television Receivers from the Republic of Korea, 55 FR 35916 (September 4, 1990), at Comment 4; Fresh Cut Flowers from Colombia, 55 FR 20491 (May 17, 1990), at Comment 62. Thus, we have not deducted these expenses from ESP in this case.

#### I. Other Issues

**Comment 42:** Federal-Mogul argues that the inspection fee placed on bearings exported from Japan by the Japan Bearing Inspection Institute (JBII) should be classified as a movement expense rather than as an indirect or direct selling expense. Federal-Mogul alleges that respondents Asahi, Izumoto, Koyo, Fujino, Nakai, and Nankai reported the JBII export inspection fee as part of indirect selling expenses, while respondents Nachi and Showa reported the fee as part of other direct selling expenses. Federal-Mogul notes that IJK, NSK, and NTN appropriately classified these expenses as movement expenses.

Nankai and Fujino argue that since these expenses are not incurred for sales in the home market, they should be classified as circumstance-of-sale adjustments. Asahi argues that inspection fees are incurred for all export sales but cannot be directly related to any specific sale. Therefore, Asahi submits, these expenses should properly be classified as indirect expenses.

**Department's Position:** We disagree with Federal-Mogul and Asahi Seiko. The JBII does not provide movement services to manufacturers/exporters of AFBs. Rather, the inspection fee represents a cost incurred by AFB manufacturers/exporters to ensure the quality of the products being produced by the Japanese bearing industry. Therefore, the Department views this mandatory inspection fee on all bearings exported as a direct selling expense and made a circumstance-of-sale adjustment for this expense for these final results.

**Comment 43:** Federal-Mogul contends that the Department should not reduce FMV by the actual amount of each discount, rebate, and circumstance-of-sale adjustment reported, but rather should first offset these adjustments by an amount for imputed interest income due to delays in paying these expenses.

Federal-Mogul proposes that this imputed interest income can be calculated by using the average age of each accounts payable and the respondents short-term interest rate. Additionally, Federal-Mogul contends that home market credit expenses should be offset or reduced by analogous savings attributable to any delayed payment of home market taxes accrued on the sales of merchandise in the home market. Federal-Mogul asserts that the true cost to the respondent is not the amount paid out, but rather the amount paid out minus the savings realized by paying that amount some time after the obligation to pay was incurred.

**Department's Position:** We disagree with Federal-Mogul. The Department has addressed this issue in other cases, and has consistently rejected the idea of imputing expenses or costs when a company quantifies and documents its actual expenses. See Television Receivers, Monochrome and Color, from Japan; Final Results of Antidumping Duty Administrative Review, 52 FR 8940 (March 20, 1987); 54 FR 13918 (April 6, 1989); 54 FR 35519-20 (August 28, 1989); 56 FR 34178 (July 26, 1991). Moreover, as stated in the first review of this proceeding, any savings resulting from the deferred payment of a discount or rebate would have been taken into account by the seller in setting the terms of the discount or rebate. See Final Results of Antidumping Duty Administrative Review; Antifriction Bearings and Parts Thereof From the Federal Republic of Germany, 56 FR 31718 (July 11, 1991). Therefore, it is not necessary to adjust actual cost to the seller.

**Comment 44:** Federal-Mogul claims that certain U.S. direct selling expenses—advertising and technical service expense—were erroneously included in the SKF-Germany ESP offset cap. Also, FMV was understated because the Department deducted home market commissions twice.

SKF-Germany argues that the advertising expenses are indirect and that the technical service expenses are *de minimis* in magnitude. Therefore, no changes need to be made to indirect selling expenses.

**Department's Position:** We agree with Federal-Mogul in part, because certain SKF-Germany technical service expenses are directly related to the sale of the subject merchandise. Therefore, we excluded these direct expenses from the ESP offset cap. However, contrary to Federal-Mogul's position, advertising expenses were determined to be indirect selling expenses and, therefore, are properly included in the ESP offset cap.

Furthermore, we agree that we deducted home market commission twice and have corrected this error.

**Comment 45:** Federal-Mogul argues that, when SKF-Italy earns interest revenue on transactions where customers make late payments, the price used in the calculation of credit expense should be net of the amount of interest revenue earned.

**Department's Position:** We disagree with Federal-Mogul. Based on the terms of payment, SKF-Italy and its customers establish a fixed period of time in which SKF agrees to extend credit and absorb the costs of this extension of credit. It is this fixed period which forms one of the bases for SKF's pricing practices. We regard interest paid on late payments as tantamount to a loan between SKF and its customers. Such financial arrangements go beyond the purview of this adjustment which relates solely to differences in payment terms between U.S. and home market transactions. Therefore, we have not taken into account interest revenue in the calculation of credit expense.

**Comment 46:** For a number of questionnaire items (packing material, packing labor, inventory carrying cost, technical services, direct warranties, guarantees, and servicing, and other indirect selling expenses), FAG-UK and FAG-Italy provided allocated, instead of sale- or customer-specific information, which was based on a more extensive product range than just subject merchandise. Torrington contends that FAG has not provided sufficiently accurate and detailed information and, since this is neither the original investigation nor the first review, FAG should be required to submit information demonstrating the accuracy and reasonableness of the methodology used for each adjustment, or recalculate these adjustments to more accurately reflect the actual costs incurred in selling UK-origin AFBs in the U.S. Torrington argues that the Department should resort to BIA in the absence of, at least, customer-specific adjustment information.

**Department's Position:** We disagree with Torrington. FAG-UK and FAG-Italy state that they are unable to provide the data in the format requested by the Department, and have made an effort to present the data in a format which approaches the Department's preferred format as closely as their records will allow. We verified FAG-UK and found its allocation methodologies to be accurate and reasonable. In the first administrative review of antifriction bearings, we verified the sales data submitted by FAG-Italy and



found its allocation methodology acceptable for our purposes. To date, we have discovered no evidence to suggest that FAG-UK or FAG-Italy's allocation methodology is unrepresentative of their actual experience, and have used the reported data in these final results. See Final Results of Administrative Review; Antifriction Bearings from Germany, 54 FR 31721 (July 11, 1991).

**Comment 47:** NTN asserts that the Department erred in deducting direct selling expenses from the U.S. price. NTN argues that direct selling expenses are differences in circumstance of sale. Therefore, the only lawful means to account for these expenses is through an adjustment to FMV. NSK also argues that direct selling expenses should not be deducted from exporter's sales price but, instead, added to foreign market value. NTN and NSK cite *Timken Co. v. United States*, 673 F. Supp. 495 (CIT 1987).

**Department's Position:** The Department's decision to deduct direct selling expenses from USP in an ESP situation is consistent with our long-standing administrative practice, and is in accordance with 19 CFR 353.41(e). See Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico, 56 FR 1794 (January 17, 1991); Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Republic of Germany, 56 FR 31723 (July 11, 1991); Final Results of Antidumping Duty Administrative Review; Brass Sheet and Strip From Sweden, 55 FR 49317 (November 27, 1990). The ruling cited by NTN and NSK is in the process of being appealed by the Department. Until a further decision is made, we will respectfully decline to discontinue our usual practice of deducting direct selling expenses from USP in ESP situations.

**Comment 48:** Torrington holds that Nachi's claim for an adjustment for home market post-sale warehousing should be considered an indirect rather than direct selling expense. Torrington states that Department precedent and judicial authority hold that warehousing is permitted as a direct selling expense adjustment only where the expense is incurred after the sale. Torrington maintains that Nachi did not establish that the expenses were related to a particular sale or were required by term of contract.

**Department's Position:** We have no reason to believe that Nachi changed its post-sale warehousing accounting system between this review and the verified information of the first administrative review. In the first

administrative review in this proceeding, we determined that Nachi's post-sale warehousing expense was, in fact, incurred after the sale, and that these expenses were directly related to the home market sales to which they apply. Torrington has provided no new information requiring a reevaluation of this expense for these final results. Therefore, we have continued to make a circumstance-of-sale adjustment for Nachi's directly related post-sale warehousing expenses. See Antifriction Bearings and Parts Thereof, from the Federal Republic of Germany; Final Results of Administrative Review, 56 FR 31726 (July 11, 1991).

#### 16. Cost of Production and Constructed Value

**Comment 1:** Federal-Mogul argues that the Department should have instituted a COP investigation of SNR.

**Department's Position:** We disagree. The Department carefully analyzed the cost data presented by Federal-Mogul and determined that there was insufficient evidence to initiate a sales-below-cost investigation. Federal-Mogul did not provide adequate detailed home market cost data or U.S. production cost data adjusted to reflect production costs in the home market to support its below-cost allegation.

**Comment 2:** Torrington contends that FAG-Germany's sale of land is not a manufacturing operation, nor is it related to manufacturing operation. Torrington states that although FAG-Germany intended to use the land for operations, its options were open for its ultimate use. Torrington argues that the income from the sale of the land is not directly attributable to the day-to-day operations as FAG's financial statements did not include the income as a part of income from operations. Federal-Mogul also states that the income from the sale of the land is not related to production, and certainly not related to the subject merchandise during the period of review.

FAG-Germany contends that the revenues from the sale of land and from prior periods are related to normal operations and were properly offset against the submitted costs. FAG states that excluding these items is internally and logically inconsistent and ignores an important facet of the operation and management of a manufacturing company. FAG contends that the Department has accepted similar adjustments in previous cases. FAG states that the land was purchased with the intent of expanding factory production.

**Department's Position:** We agree with Torrington and Federal-Mogul. Income

derived from the sale of land does not relate to the production costs for the subject merchandise, and income related to prior years does not comprise part of the manufacturing cost for the period under review. FAG-Germany's intent to use the land for operations is different from its actual use, which was solely as an investment. Furthermore, FAG's own financial statement did not report this income as related to operations. Accordingly, we did not reduce production costs with the income derived from this source.

**Comment 3:** Federal-Mogul argues that comparisons between home market sales and cost of production were not meaningful because FAG-Germany did not include selling, movement and packing expenses in its cost of production, and the Department made no adjustments to either the COP or home market prices so that these expenses were accounted for equally in both.

**Department's Position:** We agree that selling and movement expenses were not included in the cost of production or deducted from the sales price and have incorporated these expenses for these final results. We disagree, however, that packing expenses were not included in the COP in our preliminary results. We added to the COP the amount that was incurred for each home market sale.

**Comment 4:** GMN contends its submitted costs properly include all net interest expense and no adjustment is necessary or appropriate.

**Department's Position:** The Department agrees in part. The submitted cost-of-production data included an offset to interest expenses for imputed costs included in GMN's cost of manufacturing. The deduction was appropriately made to COP but should not have been made to the interest expense. The submitted COP would not be changed by a reclassification of the deduction. Therefore, for these final results, the Department accepted GMN's submitted amounts.

**Comment 5:** Federal-Mogul notes that, in its analysis memorandum for the preliminary results, the Department indicated that it had treated INA-Germany's research and development expense as a G&A expense and not an indirect selling expense, as submitted by INA. Federal-Mogul states that there is no indication that the R&D expenses were removed from the indirect selling expense and urges the Department to make this change for the final results. INA-Germany asserts that it reported R&D as indirect selling expenses in accordance with the instructions in the



Department's questionnaire. INA states that its treatment of R&D expense in its CV response was correct, and the change requested by Federal-Mogul should not be made.

**Department's Position:** Selling expenses are those costs associated with selling the merchandise. R&D is not a cost associated with selling the merchandise. Therefore, as we indicated in our analysis memorandum, we treated R&D expenses as general administrative expenses and not indirect selling expenses. Federal-Mogul is correct in its assertion that we failed to deduct the equivalent amount from indirect selling expenses. We have done so for these final results.

**Comment 6:** Federal-Mogul claims that the Department used inconsistent comparison values in the home market cost test for SKF-Germany and SKF-Sweden. SKF asserts that the comparison values are consistent because direct and indirect selling expenses are included in COP. Additionally, imputed credit and inventory carrying costs are not included in the actual COP.

**Department's Position:** We agree with SKF. Total selling expenses were included in COP and therefore should not be deducted from the price. Imputed credit and inventory holding costs are not included in COP and should not be deducted from the price consistent with Department practice. See *New Minivans from Japan; Final Determination of Sales at Less Than Fair Value*, 57 FR 21937 (May 26, 1992). Movement expenses are appropriately deducted from the price consistent with Department practice. *Ibid.*

**Comment 7:** Federal-Mogul contends that FAG-Italy's submitted costs for inputs from related entities understates costs because it omits profit. Federal-Mogul states that the statute requires the value of related-party transactions be stated at a fair value.

FAG-Italy contends that where there is no independent market for bearing parts which could be used to establish market prices, the use of COP information is appropriate.

**Department's Position:** We agree with FAG-Italy. The record does not provide specific evidence that warrants rejecting using cost of production to value purchases from related parties. The company and its counsel certified that this information was accurate.

**Comment 8:** Federal-Mogul argues that the Department should revise FAG-Italy's submitted financial expenses to correct a clerical error.

**Department's Position:** The Department's analysis determined that this clerical error has no effect upon the

margin calculation. Therefore, no adjustment is required.

**Comment 9:** Federal-Mogul claims that FAG-Italy's write-offs of finished goods inventory from its home market sales warehouses should be classified as a production cost rather than selling expenses.

FAG-Italy contends that their finished goods are kept at a warehouse, not the factory. FAG states that management of these goods is performed by its sales warehouse and accordingly a sales related expense.

**Department's Position:** We agree with Federal-Mogul. In this case, write-offs of finished goods inventory were considered a general expense included in the cost of production, but not a selling expense. Selling expenses are those costs associated with selling the merchandise. Write-off of finished goods inventory is not a cost associated with selling the merchandise. Therefore, we have deducted this expense from FAG-Italy's reported selling expenses in constructed value and included this expense in the general expenses included in FAG's cost of production.

**Comment 10:** Fiat argues that the Department should not have added "manufacturing staff expense" and "other income/expense" to G&A in its calculation of a G&A rate. Fiat states that manufacturing staff expense plainly is not a G&A expense, but rather is exactly what it is called, a manufacturing expense. Fiat further states that this expense item includes the costs incurred by Fiat's production planning and production technologies departments. Similarly, Fiat argues, there is no basis for the Department's decision to add the "other income/expense" item to G&A. Fiat states that this expense includes principally amortization of certain intangible assets that benefit Fiat's manufacturing operations.

**Department's Position:** We disagree. The evidence on the record indicates that "manufacturing staff expense" and "other income/expense" are general expenses and therefore should be included in the calculation of G&A expense. In its submission, Fiat identified its total expenses, broken down by expense category. Fiat clearly excludes "manufacturing staff expense" and "other income/expense" from its cost of sales (*i.e.*, cost of manufacturing). No explanation of the reason for exclusion of these two expense categories was given until the case brief. Therefore, the Department included these items in Fiat's G&A expenses and expenses excluded from G&A only R&D applicable to other products and selling expenses. We divided the total by the

amount which Fiat identified as cost of sales.

**Comment 11:** Fiat claims that the Department improperly added U.S. packing expense to CV in the calculation of FMV. The respondent argues that packing expenses were included in the material burden item of its CV data submission and, therefore, the addition of U.S. packing expense results in a double-counting of packing expense. Accordingly, Fiat requests that the Department eliminate this packing adjustment in the calculation of the final results. Alternatively, Fiat requests that the Department reduce the material burden by the amount of the packing expense addition.

**Department's Position:** In the calculation of FMV, the Department is required to add U.S. packing to CV. Although we added U.S. packing to CV, we were unable to deduct packing expense already included in CV because Fiat failed to isolate such packing expenses in its submission of CV data. The Department's questionnaire directed respondents to report packing expenses for U.S. sales as a separate cost element in the submission of CV data. Absent this information, the Department could not determine whether the packing expense included in Fiat's materials costs reflects the packing expense reported for comparable U.S. sales. Thus, Fiat's failure requires the Department to add U.S. packing expenses to CV as BIA.

**Comment 12:** Federal-Mogul alleges that Meter made improper deductions to interest expense. Federal-Mogul states that the Department's practice only has been to net out short-term interest income in adjusting constructed value interest expense. Federal-Mogul contends that the only short-term income earned by Meter was for interest on government bonds.

Meter argues that it correctly deducted short-term interest income from gross interest expense and claims that Federal-Mogul misunderstood Meter's response. Meter states, that in addition to government bond interest, there were other sources of short-term interest income.

**Department's Position:** We agree with Meter. The Department verified that Meter's interest expense calculations were accurate.

**Comment 13:** The Department's constructed value verification report indicates that Meter erred in its calculation of overhead by omitting the cost of small asset purchases and that this error would later be corrected. Federal-Mogul contends that Meter did not properly make this correction in its



post-verification submission. Meter had originally classified small asset purchases as "Purchases of Inventory" and included this amount in cost of goods sold (COGS) rather than factory overhead. The amount representing small asset purchases, by which COGS was reduced, is not the same amount as small asset purchases by which factory overhead was increased.

Meter argues that its calculation of the cost of small asset purchases is correct. This cost was an element used in the calculation of both COGS and factory overhead. The reason the cost of small asset purchases varies in each of these two instances is that, in calculating COGS, Meter included all small asset purchases for fiscal year 1990 in "Purchases of Inventory," while only those small assets that were associated with the subject merchandise during the POR were used to calculate factory overhead. Meter contends that it was correct to follow these methodologies.

**Department's Position:** We have accepted the respondent's calculations for these final results. Where possible, the Department prefers, but does not require, that calculations be done on a product-specific basis. The Federal Circuit has endorsed this approach. See *Smith-Corona Group v. United States*, 713 F.2d 1568 (1983). In calculating COGS, Meter was not able to provide product-specific data. Rather, Meter used the total amount of small asset purchases made in fiscal year 1990 in calculating COGS. When this cost was transferred to overhead, this total was deducted from COGS. We determined that this calculation methodology is reasonable. For the overhead allocation, Meter reasonably allocated product-specific amounts of the cost of small asset purchases.

**Comment 14:** IJK contends that the Department must use constructed value data for purchased products which IJK submitted in its narrative response. IJK also argues that the Department used the incorrect variable when merging sales and constructed value data.

**Department's Position:** We agree with IJK and have adjusted the calculations for purposes of these final results.

**Comment 15:** Federal-Mogul argues that, in the IJK constructed value calculation, the tests for the statutory minimum SG&A and profit are executed in the computer program before the recalculation of the interest expense. Federal-Mogul contends that the test should be performed on the new recalculated CV rather than on the original submitted CV. IJK agrees that the revised factors must be reflected in the statutory minimum tests. However, IJK argues that, as the interest expense

and SG&A expense are derived directly from the financial statements, SG&A must also be recalculated if interest expense is recalculated, so that both variables may still be tied to the financial statements.

**Department's Position:** We disagree with Federal-Mogul. As IJK's interest expense is derived directly from the financial statements, the recalculation of interest expense affects the SG&A expense. Consequently, we made the corresponding adjustment to SG&A. The recalculations were executed in the computer program before execution of the statutory minimum tests.

**Comment 16:** NPBS argues that the Department has misunderstood the manner in which its time and motion study was conducted. The verification report states that manual processing time was not adequately accounted for in NPBS's allocation methodology. NPBS contends that the study does in fact properly account for both labor and machine time and that there is documentation on the record explaining the methodology used. NPBS also argues that the Department's statement in the verification report that the verification team was unable to duplicate the process times reported by NPBS is inaccurate and misleading. NPBS states that the discrepancies are due to inaccuracy in timing and to differences in opinion regarding which processes should be included in each step. NPBS contends that its time and motion study was conducted in accordance with accepted methods and should be accepted by the Department.

**Department's Position:** The issue raised by this comment is moot, because we are relying exclusively upon BIA to determine NPBS's dumping margins.

**Comment 17:** NPBS argues that its special depreciation expenses were appropriately reported and verified. Special depreciation is an accelerated depreciation for certain machines which is allowed by Japanese GAAP. NPBS did not include special depreciation expenses in its cost-of-production response because they are classified as non-operating expenses under Japanese GAAP. NPBS argues that the Department verified all of its depreciation expenses and that the Department should use the reported cost data for the final results.

**Department's Position:** The issue raised by this comment is moot, because we are relying exclusively upon BIA to determine NPBS's dumping margins.

**Comment 18:** Tottori asserts that the Department erred by failing to exclude all consumption taxes included in Tottori's reported materials costs. Tottori states that the Department

excluded the consumption tax with respect to five models in the preliminary program, but failed to exclude the reported consumption tax for the other models.

**Department's Position:** The Department agrees with Tottori and has excluded the consumption taxes included in Tottori's submitted constructed value data.

**Comment 19:** NSK notes that its reported interest expense was revised for COP and CV. NSK argues that the Department failed to provide NSK with the details of this adjustment.

Torrington objects to NSK's methodology and supports the Department's calculation as consistent with agency practice.

**Department's Position:** We agree with Torrington. Consistent with long-standing Department practice, we adjusted NSK's reported interest expense was adjusted to reflect the percentage of such expenses reported in NSK's consolidated financial statements. We have reviewed the adjustment made to NSK's reported interest expense for the preliminary results and noted a minor clerical error in that calculation, which has been corrected for these final results. Finally, we agree with NSK that details of the adjustment were not included in the file or disclosure documents and have since corrected this omission.

**Comment 20:** NSK asserts that the Department incorrectly adjusted NSK's HM price for purposes of the cost test. NSK claims that the Department erroneously reduced HM price by early payment discounts and distributor incentives. It is NSK's understanding that the Department intended to subtract any discounts from the unit price for purposes of the cost test. NSK argues that HM discounts and distributor incentives are not reported as reductions in sales revenue for their accounting purposes, but as expenses. NSK contends that these expenses are included in the COP for purposes of the cost test, but are not included in unit price, resulting in an inequitable comparison. Torrington argues that NSK fails to point to any evidence on the record supporting its claim that the discount and distributor incentives are recorded as expenses in NSK's accounting system. Torrington refers to NSK's Exhibit D-27, where NSK submitted a detailed listing of cost of manufacturing, sales expenses, and G&A expenses, and argues that there is no evidence suggesting that the adjustments in question are included in the COP calculation.



**Department's Position:** We agree with NSK that price adjustments treated as expenses and included in the COP calculation should not be subtracted from unit price for the purposes of conducting a cost test. However, we agree with Torrington that NSK's early payment discounts or distributor incentives are included as expenses in its COP data. Consequently, we have made no changes in the cost test.

**Comment 21:** Torrington argues that the Department should eliminate the effect of the level-of-trade allocation prepared by NTN-Japan in reporting their G&A expenses.

NTN-Japan contends that the Department correctly used its reported G&A expenses. NTN believes that Torrington is incorrect in stating that G&A must be calculated on a corporate-wide basis. NTN believes that this interpretation is contrary to the statute.

**Department's Position:** We agree with Torrington and have adjusted the G&A figure reported by NTN-Japan. It is the Department's long-standing practice to regard G&A expenses on a corporate-wide basis. As noted in Small Business Telephones from Korea, 54 FR 53149 (December 27, 1989), "[t]he Department considers general expenses to be those expenses incurred for the operation of the corporation as a whole and that are not related to a specific business segment of a corporation or the manufacture of a particular product." Accordingly, we have relied upon the corporate-wide G&A experience in reaching these final results.

**Comment 22:** Torrington argues that the Department should reject NMB/Pelmech Singapore's cost accounting system and use BIA.

NMB/Pelmech Singapore argues that its methodology was verified in the prior review to adequately capture and allocate all of the actual costs to the products. Therefore, no adjustments are warranted.

**Department's Position:** We agree with NMB/Singapore. The Department has analyzed NMB/Pelmech Singapore's cost accounting system in the prior review and noted that the methodology adequately captured and allocated actual costs to the products. There is no evidence on the record that the system is now inadequate.

**Comment 23:** Torrington asserts that NMB/Pelmech Singapore did not demonstrate how expenses at the head office were allocated. Therefore, the Department should use BIA.

NMB/Pelmech Singapore asserts that head office expenses were allocated in the same manner as verified by the Department in the prior review.

**Department's Position:** We agree with NMB/Pelmech Singapore. The firm was instructed to include head office expenses. There is no evidence on the record which suggests that NMB/Pelmech did not allocate head office expenses in accordance with generally accepted accounting principles. Therefore, no adjustment is warranted.

**Comment 24:** Torrington urges the Department to apply a BIA rate for R&D to all SKF-Sweden bearings because it claims the record remains unclear as to how SKF accounted for R&D activities at its research center.

SKF-Sweden argues that its methodologies have been verified in the past and found to be acceptable.

**Department's Position:** We agree with SKF. There is no evidence on record that the R&D expenses were not allocated in an appropriate manner. Therefore, no adjustment is warranted.

**Comment 25:** Torrington urges the Department to verify the standard costs for SKF-Sweden prior to the final results.

SKF Sweden asserts that its cost systems have been verified in the past and that the Department, not Torrington, has the right to set the verification schedule.

**Department's Position:** We disagree with Torrington. The Department has accepted SKF-Sweden's submitted response. The Department has no evidence which indicates that cost data submitted are inadequate. The company and its counsel certified that this information is accurate. Finally, we are not required to verify all sales and cost data submitted in each review period. The fact that we did not verify SKF-Sweden is not sufficient reason to reject its cost response.

**Comment 26:** Torrington argues that SKF-Sweden failed to provide production quantity data by model and detailed worksheets demonstrating the cost methodologies. Failure to report reliable costs justifies the general use of BIA.

**Department's Position:** We disagree. The Department determined that a listing of production quantities was not needed since the cost were submitted using standard costs plus variances. Furthermore, the Department has verified SKF-Sweden in a prior review and has a full understanding of the methodologies used to prepare the response. The company and its counsel certified that this information was accurate. There is no evidence that the cost data may be unreliable for purposes of this review. Therefore, BIA is not warranted.

## 17. Exchange Rates

**Comment 1:** Koyo asserts that the Department erred in its preliminary margin calculations by failing to account for the increase in Koyo's antidumping margin that the company claims is attributable to a sudden severe fluctuation in currency exchange rates during the POR.

Koyo maintains that the Department should have applied 19 CFR 353.60(b), which provides as follows:

For the purposes of investigations, producers, resellers, and importers will be expected to act within a reasonable time to take into account price differences resulting from sustained changes in prevailing exchange rates. When the price of the merchandise is affected by temporary exchange rate fluctuations, the Secretary will not take into account in fair value comparisons any difference between United States price and foreign market value resulting solely from such exchange rate fluctuations.

Although the regulation is limited to investigations on its face, Koyo argues that the Department should follow the CIT decision in *Industrial Quimica Del Nalon S.A. v. United States*, 729 F. Supp. 103, 110 (CIT 1989), which held that section 353.60(b) applies to administrative reviews as well as investigations.

Koyo also takes issue with the Department's position, delineated in *Coated Groundwood Paper From France*, 56 FR 56380, 56384 (November 4, 1991), that section 353.60(b) does not apply unless temporary exchange rate fluctuations alone are responsible for the antidumping duty margin. Koyo argues that the regulation should instead be interpreted to require the Department to discount any portion of a dumping margin that is shown to result solely from a sudden fluctuation in the exchange rate.

Koyo contends that section 353.60(b) should have been applied in the calculation of its margin because the Persian Gulf conflict caused temporary exchange rate fluctuations. Specifically, Koyo asserts that the dollar experienced a severe decline against the yen from the time of the Iraqi invasion of Kuwait in early August 1990, through the end of the U.S. military intervention, when the dollar began to rise again. Koyo thus characterizes the currency fluctuation as temporary and unsustainable, and therefore maintains that the Department should not consider any increase in the margin that resulted from these changes in the dollar/yen exchange rate.



Torrington and Federal-Mogul respond that section 353.60(b) applies only to investigations on its face and that notwithstanding the CIT decision in *Industrial Quimica*, the Department should continue to apply this provision only in investigations. Federal-Mogul notes that certification for appeal of the issue of whether section 353.60(b) applies to administrative reviews was denied (*Industrial Quimica Del Nalon, S.A. v. United States*, 732 F. Supp. 1180 (CIT 1990)) and that the Court ultimately sustained the Department's refusal to grant a currency rate adjustment. *Industrial Quimica Del Nalon, S.A. v. United States*, Slip Op. 91-43 (May 24, 1991). Federal-Mogul therefore asserts that the authority cited by Koyo is not dispositive and the Department should maintain its position that section 353.60(b) applies only in investigations.

Torrington proffers several additional arguments in support of its position that the Department should not make an allowance for temporary exchange rate fluctuations in the manner suggested by Koyo. Torrington cites *Groundwood Paper*, supra, in stating that the Department normally will not invoke section 353.60(b) unless temporary exchange rate fluctuations alone are responsible for the overall weighted-average dumping margin; in this case Koyo has failed to demonstrate that the exchange rate changes in question were the sole cause of the dumping margin. Torrington also contends that the changes in the dollar/yen rate referenced by Koyo were not temporary but were in fact sustained changes, in which case section 353.60(b) does not permit the Department to make an adjustment for the change in the exchange rate.

**Department's Position:** We disagree with Koyo. The "special rule" contained in 19 CFR 353.60(b) is explicitly limited to application in less than fair value investigations, not administrative reviews. The CIT's decision in *Quimica* that the rule is applicable to reviews is not final and the Department has been unable, as yet, to appeal the decision to a higher court. Furthermore, it is the Department's view that sufficient flexibility exists under the law in determining fair value in investigations to permit application of the special rule in the narrow circumstances therein defined, but that no discretion exists in determining foreign market value in reviews under section 751 of the Tariff Act to make currency conversions other than as specified in 31 U.S.C. 5151. As a matter of policy, the Department believes that the limited flexibility promulgated in the regulations is

warranted in initial investigations for circumstances essentially beyond the control of exporters and importers unaccustomed to the disciplines and rules of the antidumping duty law. Such flexibility would be inappropriate in the administration of an antidumping duty order, under which exporters and importers are, or must be presumed to be, on notice that changes in exchange rates can and will affect their antidumping duty liability. Therefore, these parties can be expected to set their prices accordingly. See Final Results of Antidumping Duty Administrative Reviews; Portable Electric Typewriters From Japan, 56 FR 56393, 56395 (November 4, 1991).

**Comment 2:** Fiat asserts that the Department did not use the daily exchange rate rather than the quarterly rate established by the Treasury Department when the two differed by at least 5 percent, as required by 19 CFR 353.60(a). Fiat accordingly requests that the Department apply the daily rates, where appropriate, in calculating its final results for the company.

**Department's Position:** The Department agrees with respondent and will apply the daily rate where appropriate.

#### 18. Foreign Taxes, Duties and Drawback

**Comment 1:** Torrington argues that the Department erred by adding the value added tax (VAT) (consumption tax in the case of Japan) calculated on U.S. price (USP) to both the adjusted home market price (HMP) (net of VAT) and USP. Torrington claims that the statute proscribes an upward adjustment to USP with no adjustment to HMP. In those cases where the HMP is reported net of VAT, Torrington recommends that the Department multiply the HMP by the VAT percentage and add the result to the HMP. Federal-Mogul argues that the Department should use a U.S. tax base that does not exceed the f.o.b. export value of AFBs exported to the U.S. They cite to *Zenith Electronics Corp. v. United States*, 10 CIT 268, 276, 633 F. Supp. 1382, 1389 (1986) ("*Zenith I*"), appeal after remand dismissed for lack of jurisdiction, 875 F.2d 291 (Fed. Cir. 1989); *Zenith I*, supra, 10 CIT at 276, 633 F. Supp. at 1389; *Zenith Electronics Corp. v. United States*, 15 CIT \_\_\_\_\_, 770 F. Supp. 648, 651 (1991) ("*Zenith II*"); *Daewoo Electronics Co. v. United States*, 15 CIT \_\_\_\_\_, 760 F. Supp. 200, 207-208 (1991) ("*Daewoo*"); *Zenith Electronics Corp. v. United States*, 14 CIT \_\_\_\_\_, 755 F. Supp. 397, 405-406 (1990) ("*Zenith III*"); *Daewoo*, supra, 13 CIT at 280-282, 712 F. Supp. at 955-956; *AOC Int'l. Inc. v. United States*, 13 CIT 716, 725, 721 F. Supp. 314, 321-322 (1989);

and section 772(d)(1)(c) of the Tariff Act to support their arguments.

FAG and SKF point out that section 772(d)(1)(c) provides for the adjustment to USP only "to the extent that such taxes are added to or included in the price of such or similar merchandise sold in the country of exportation."

GMN, FAG, INA, and SKF argue that the Department should not make an adjustment to USP or FMV when VAT taxes are not included in the HM prices in the relevant home markets, i.e., VAT is billed separately. FAG further argues that the Department does not have statutory authority to make any adjustment for VAT under section 772(d)(1)(c).

GMN, INA, FAG, Koyo, Cooper, and NSK maintain that if the Department does, however, decide to make VAT-inclusive comparisons, that a circumstance-of-sale (COS) adjustment must be made to FMV to eliminate the absolute difference between the amount of VAT in the two markets.

**Department's Position:** Because all HM sales were reported net of VAT, we added the same VAT amount to FMV as that calculated for USP. This is equivalent to calculating the actual HM tax and then performing a COS adjustment to FMV to eliminate the absolute difference between the amount of tax in each market. We are not following *Zenith* and its progeny with respect to this issue, because we disagree and such voluntary acquiescence would deprive the Department of its right to appeal this issue in this proceeding. Rather, we are relying on the Department's broad statutory authority to make adjustments for such differences in the circumstances of sale. See *Smith-Corona v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), cert. den., 465 U.S. 1022 (1984).

We added an imputed VAT to USP under section 772(d)(1)(c) because the VAT is "added to" the HMP. The fact that the VAT was added to the HMP deals with the respondents' comments that, because the VAT was billed separately, it was not "included in" the HMP. We did not adjust for VAT by employing a tax-net FMV (and USP) because we agree that the statute directs us to adjust for HM consumption taxes through an addition to USP. No VAT was added to USP where FMV was based on CV. Similarly, no VAT was added to USP where FMV was based on third-country sales, because there is no tax forgiven "by reason of the exportation of the merchandise to the United States" in FMV for such sales. Because there is no VAT in FMV to be offset by an adjustment to USP, in



either case, any reduction in the margin that would result from such an adjustment would be unjustified.

We disagree with Federal-Mogul that the Department should use a U.S. tax base that does not exceed the f.o.b. export value of AFBs exported to the United States. We used the tax base that was most compatible to that used in the home market. There is nothing on the record which establishes the f.o.b. export value as the proper tax base.

We calculated the addition to USP by applying the HM tax rate to the net USP after all other adjustments were made. This imputed tax amount is BIA, because HM sales were reported net of VAT, and we are thus unable to determine what the home market tax base was.

*Comment 2:* Federal-Mogul argues that the Department is required to measure the amount of tax which is passed through to home market purchasers, pursuant to section 772(d)(1)(C) of the Tariff Act. As support for its argument, Federal-Mogul relies on decisions by the CIT in *Zenith I*, *Daewoo Electronics Company, Ltd v. United States*, 712 F. Supp. 931 (CIT 1989), and *Zenith III*. Moreover, citing *Daewoo*, Federal-Mogul argues that, because respondents benefit from tax adjustments to U.S. price, they should be required to establish their entitlement to such adjustments by determining the amount of home market tax incidence, in accordance with a methodology chosen by the Department. Federal-Mogul maintains that since respondents have not established their entitlement to a tax adjustment, and the Department has failed to ascertain home market tax incidence, there is no basis for a tax adjustment to U.S. price.

Koyo and NSK disagree, arguing that a proper reading of the statute does not compel the Department to adopt a tax pass-through analysis.

*Department's Position:* We do not agree with the CIT's decisions in *Zenith I*, *Daewoo*, or *Zenith III*, but have not had the opportunity to appeal this issue on its merits. Therefore, consistent with our long-standing practice, we have not attempted to measure the amount of tax incidence in the home market. We do not agree that the statutory language, limiting the amount of adjustment to the amount of consumption tax "added to or included in the price" of bearings sold in the home market, requires the Department to measure the home market tax incidence. Regarding Federal-Mogul's argument that respondents must establish entitlement to the tax adjustment to U.S. price, we are satisfied that the record shows that the taxes were charged and paid on home

market sales. Therefore, the respondents are entitled to the adjustment to U.S. price.

*Comment 3:* Federal-Mogul asserts that SKF-Italy's claim for duty drawback on steel-based products exported to non-E.C. customers should be denied because SKF has not demonstrated any link between the import duties paid on materials in the exported AFB and the payments received by SKF. In addition, Federal-Mogul claims that, according to SKF-Italy's Section B response, the duty drawback is a refund of U.S. Customs duty and internal indirect taxes which have been directly and indirectly on their manufacture. Federal-Mogul contends that sections 772(d)(1)(b) and (c) of the Tariff Act authorize an adjustment for duty drawback and for forgiven indirect taxes imposed directly on the merchandise and not for indirect taxes imposed indirectly on the merchandise. Therefore, the Department should disallow SKF-Italy's duty drawback claim.

SKF-Italy contends that it provided extensive documentation concerning the duty drawback claim during verification and that it demonstrated that all the eligibility requirements for a duty drawback adjustment were met. SKF-Italy maintains that the Department should allow the duty drawback claim as it did in the investigation and first administrative review.

*Department's Position:* The Department reviewed documentation, including the Italian legislation concerning duty drawback, during verification in Italy, and we are satisfied that SKF-Italy is eligible for, and actually receives, a duty drawback upon the export of steel-based AFBs. Accordingly, and consistent with the first administrative review, the Department has accepted SKF-Italy's duty drawback claim.

*Comment 4:* SNECMA-Italy maintains that it erred by reporting a duty drawback adjustment for certain third country sales. SNECMA claims that because AFBs were re-exported, it was assumed that duty drawback had been claimed. SNECMA confirms that there was no claim for duty drawback on the AFBs in question and that the Department should correct the margin analysis program accordingly to ensure a fair and accurate calculation of antidumping duties.

*Department's Position:* The Department has accepted SNECMA-Italy's correction of their duty drawback adjustment and has amended the margin analysis program to reflect this correction.

*Comment 4:* Torrington argues that the Department should reject NMB/Pelmec

Thai's claimed adjustment for uncollected or rebated duties or taxes because the respondent failed to adequately support its claim with documentation on its imports, the duties and taxes at issue, and its home market sales.

NMB/Pelmec Thai argues that it has provided full explanations of its claimed adjustment in its questionnaire response, and that the type of proof Torrington requests is beyond the requirements of the questionnaire. The Department verified and accepted the information in the original investigation and in the first review, and should accept it for the second review as well.

*Department's Position:* Based on the information provided in NMB/Pelmec Thai's questionnaire response, we have accepted its claim for an adjustment for these expenses. NMB/Pelmec Thai has provided adequate information to support its claim for this adjustment.

#### 19. Romania-Specific Issues

*Comment 1:* TIE argues that the Department's own rules forbid it to use as surrogate information data for a party which is currently subject to review, or related to a party which is under review. TIE also contends that the NMB/Pelmec data is inconsistent with publicly available data. Therefore, TIE maintains that the Department should not use the labor information supplied by NMB/Pelmec.

Torrington supports the Department's use of NMB's data as surrogate information, citing a decision by the CIT, dealing with a party related to a firm under review, which explained that "the policy proscribing use of a related firm's costs clearly does not apply to situations where that data is used as BIA." *Tehnointerport v. United States*, 766 F. Supp. 1169 at 1176. Therefore, under certain circumstances, the Department is authorized to use as surrogate data information from a company that is under review or related to companies under review. Regarding TIE's claim that the Department should rely on "publicly available data" for the valuation of labor, Torrington points out that the data recommended by TIE "covers a range of industries" and, therefore, does not represent the bearings industry as does data from an actual bearings company.

*Department's Position:* At the outset of this review, the Department determined that five countries were appropriate as surrogates for Romania. The five countries selected were: Thailand, Turkey, Argentina, Malaysia, and Chile. The Department indicated that, of these countries, Thailand was



the preferred surrogate. In an effort to obtain the best possible surrogate data, the Department sent questionnaires to the U.S. embassies in each of these surrogate countries. We requested that these embassies, in turn, distribute our questionnaire to bearings producers within these countries. NMB/Pelmech was the only company to respond to our questionnaire. Although we disagree with TIE regarding its claim that the Department is forbidden to use surrogate information submitted by a party under review, we recognize that NMB/Pelmech, as a manufacturer of high-quality specialized bearings, may not be ideal for comparison purposes. But, in valuing certain components for the preliminary results, we found the NMB/Pelmech data to be the most reliable information available. Wherever we decided to use NMB/Pelmech's information, it was because it had been determined to be the best available information on the record at the time the preliminary results were issued. Recently, we learned of a new source of information regarding Thai wages, including specific data regarding wages in the fabricated metal products industry. This source was the 1990 Annual Economic Report of the Bank of Thailand. As established in the Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 57 FR 21058, 21062 (May 18, 1992), the Department prefers, to the extent possible, the use of published, publicly available information when accessible because we are better assured of the reliability of such information. Therefore, for the final results, the valuation of direct labor is based upon this information.

*Comment 2:* Torrington contends that the Department should have used NMB/Pelmech information for all cost elements of constructed value, rather than just for labor and overhead rates, because it represents the actual experience of a bearings company. Regarding steel costs, for which NMB/Pelmech was not able to supply complete information, Torrington argues that the Department should use the NMB/Pelmech data, to the extent possible, rather than relying solely on import statistics. Torrington maintains that the import data should only be used for those types of steel for which NMB/Pelmech did not supply company-specific costs. Torrington also asserts that the import values used by the Department appear to be for total imports into Thailand, and that these values, therefore, include imports from non-market-economy countries, the use

of which goes against Departmental practice.

*Department's Position:* Torrington's comment misrepresents what the Department did in the preliminary results; in addition to the labor and overhead costs cited by Torrington, the Department also used NMB/Pelmech data to value packing cost. Other sources of information were used for the remaining component costs. For freight, we used the 1990 rates for a Thai freight forwarder. We consider these rates to be more reliable than those submitted by NMB/Pelmech because they are from an actual freight company. We have continued to use these rates for the final results. As indicated in our responses to Comments 1 and 5, we have elected not to use the same NMB/Pelmech information regarding labor and overhead for the final results. We are still using NMB/Pelmech data to value packing costs. For raw material costs, we did not consider the NMB/Pelmech data to be the best available information. The only data supplied by NMB/Pelmech regarding raw material costs pertained to bearing balls. Because it was necessary to rely on the published import statistics to determine the steel costs for all other components, we believed it would be better to be consistent and rely on the same source for the valuation of all component material costs. We agree with Torrington's argument that import values from non-market-economy countries should not be used to determine material costs. Therefore, for the final results, we will continue to use the published information to value steel, but these values will be based solely on imports from market-economy countries.

*Comment 3:* TIE claims that the Department used an incorrect steel classification for bearing balls. TIE contends that the classification used (Thai Customs Category 7228.31) is correct for the inner and outer rings, but not for balls. For balls, TIE argues that Thai Customs Category 7227.900-006 should have been used. For the steel used in armatures, TIE maintains that the Department used Thai Customs Category 7221.41, when it should have used 7211.490-006.

Torrington argues that the steel classification recommended by TIE—7227.900-006—is defined as possibly containing silico-manganese, which is not bearing-quality steel, and that "there is no indication on the record, in this case or any other case involving antifriction bearings, that silico-manganese steel has ever been mentioned as used to manufacture antifriction bearings."

*Department's Position:* To value armatures contained in TIE's ball bearings, the Department used Thai Customs Category 7211.41, not 7221.41, as claimed by the respondent. To value bearing balls, we used 52100 steel bar (HTS 7228.30). The Department maintains, as it did in the Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Romania, 54 FR 18992, 19080 (May 3, 1989), and in the Final Results of Antidumping Duty Administrative Review: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany, 56 FR 31692, 31738 (July 11, 1991), that these were the proper surrogate values for armatures and bearing balls.

*Comment 4:* Torrington argues that the Department should not make any deductions for scrap value because TIE has not demonstrated that it actually recovers and sells scrap generated in the production of bearings.

*Department's Position:* The Department disagrees. TIE has previously been verified twice on this matter, and it has been determined that it indeed generates and sells scrap. Therefore, based upon the two previous verifications, the Department has no reason to doubt that TIE's reported scrap data is accurate.

*Comment 5:* TIE cites several reasons why it believes that the Department should not continue to use the NMB/Pelmech overhead rate that was used for the preliminary results. First of all, TIE claims that NMB/Pelmech incorrectly included "import duty" as part of overhead, stating that the Department's questionnaire specifically states that "import duty should be included as part of raw material expenses," and that in TIE's own response to the factors of production questionnaire, import duties are listed under raw materials expense. TIE further contends that, even if these import duties were classified as overhead, they should be disregarded because they are rebated upon exportation of the finished product.

TIE also contends that, even if import duty were an acceptable expense, classifying it as overhead is improper since it is actually an SG&A expense. TIE also claims that NMB/Pelmech also misclassified a number of other SG&A expenses as overhead. The other expenses cited are: shipping supplies; automobile expenses; telephone and communications; stationery and supplies; conference and travel; entertainment; dues and subscriptions; legal and professional fees; employee



benefits; medical or treatment fees; donations; and business tax.

In addition, TIE claims that a trend has developed in the Department's calculation of overhead which has resulted in a constantly increasing overhead percentage. TIE argues that, because the bearings it produces are "low-tech" in nature, there is little overhead involved, and the bearings produced by NMB Pelmech are high-tech bearings involving a larger overhead cost.

TIE encourages the Department to use one of the two overhead rates it supplied for this review. One of these rates is for a producer of bearings in Yugoslavia; the other is an overhead rate for a metal processor in Thailand. As a last resort, TIE suggests the use of the Thai overhead rate which was used in the last review, and which Torrington had previously recommended in a submission made by the firm.

**Department's Position:** The Department agrees with the respondent that the overhead rate should, to the extent possible, be adjusted to reflect a rate exclusive of those items that are not a part of overhead. Because we do not have information on the actual quantities of each of the individual components of the NMB/Pelmech rate, it is not feasible to make such an adjustment. Nor can we use either of the two overhead rates supplied by TIE. It would not be appropriate to use the rate for Yugoslavia because Yugoslavia is not among the surrogate countries cited for this review. The rate for the Thai metal processing company is inappropriate because this is company-specific data, collected by the respondent, which is not verifiable by the Department. The Department has no knowledge of this company, nor of the manner in which this information was derived. We also do not believe that the functions of this company are comparable to those of TIE. Therefore, as best available information, we will use instead the same rate that was used in the first administrative review of antifriction bearings from Romania.

**Comment 6:** Torrington argues that, if the Department continues to base all steel values on import statistics, then the overhead rate should be adjusted because the rate used in the preliminary results reflects a percentage of NMB's labor and materials costs.

**Department's Position:** The Department disagrees. As surrogate information for overhead, we determine rates, rather than amounts, because we believe that, within industries, a relationship exists between overhead and other manufacturing costs. Therefore, it follows that if TIE's labor

and/or materials costs are lower than those of the surrogate, so too are its overhead costs. By making the recommended adjustments to overhead, we would no longer have an amount for overhead which we believe would represent TIE's overhead cost. Instead, we would have an amount representative of NMB/Pelmech's overhead experience.

**Comment 7:** Torrington contends that the Department should use the company-specific SG&A rate used in the previous administrative review, rather than the statutory minimum, because the NMB rate is more accurate.

**Department's Position:** We disagree. The SG&A rate we used in the first administrative review was used only as adverse BIA. As explained in our response to Comment 1 regarding overhead, where possible, we want to avoid rates that contain inappropriate expenses. In the notice for the first administrative review, we acknowledged that the SG&A rates contain certain expense components that were not necessarily applicable to TIE, but we chose to use that rate anyway for the sole purpose of applying adverse BIA. Final Results of Antidumping Duty Administrative Review; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany, 56 FR 31692 (July 11, 1991). For this review, we have no reason to apply adverse BIA to SG&A; therefore, we will continue to use the statutory minimum rate of ten percent for the final results.

#### 20. Singapore- and Thailand-Specific Issues

**Comment 1:** Torrington argues that NMB/Pelmech Thai's Route B sales should be excluded from the HM database. Torrington states that the Department determined that these sales were appropriately considered third country sales in the original investigation, and excluded the sales from the database.

NMB/Pelmech Thai contends that Torrington is mistaken in its request to have Route B sales excluded from the HM database. The sales referred to in the original investigation are different from the sales NMB/Pelmech Thai has labelled as Route B sales in the first and second administrative reviews. The Route B sales referred to in the original investigation were sales made through NMB/Pelmech Thai's related selling agent, Minebea Singapore Branch (MSB), to a Thai customer. The Department found that the first sale to an unrelated party occurred in Singapore. NMB/Pelmech Thai did not include these sales in its HM database.

The Route B sales in the first and second reviews are also sales made through MSB; however, the first sale to an unrelated party occurs in Thailand. NMB/Pelmech Thai properly included these Route B sales in its HM database. NMB/Pelmech Thai states that these sales were accepted by the Department in the first administrative review.

**Department's Position:** The Route B sales included in the HM database are properly classified as HM sales. The first sale to an unrelated party occurred in Thailand. These sales were accepted as HM sales and verified during the original investigation and first review, and no new information has been presented which would warrant their exclusion.

**Comment 2:** Torrington argues that bonded warehouse-to-bonded warehouse sales should be excluded from NMB/Pelmech Thai's HM database. Torrington contends that in the original investigation the Department determined that sales from NMB/Pelmech Thai's bonded warehouse to the bonded warehouse of a related OEM should not be considered HM sales, and that the Department should abide by its own precedent in this case.

NMB/Pelmech Thai argues that these sales should be included in the HM database. NMB/Pelmech Thai reported sales from its bonded warehouse to the bonded warehouse of an unrelated OEM customer. NMB/Pelmech Thai states that because of various benefit programs in Thailand, bonded warehouse-to-bonded warehouse sales are common. NMB/Pelmech Thai presumes that bearings sold to bonded warehouses will be consumed in the home market. These sales were accepted by the Department in both the original investigation and the first review. NMB/Pelmech Thai states that there is no new information which would lead the Department to change its treatment of these sales.

**Department's Position:** NMB/Pelmech Thai properly reported sales from its bonded warehouse to the bonded warehouse of an unrelated customer as home market sales. In the original investigation, the Department determined that sales from NMB/Pelmech Thai's bonded warehouse to the bonded warehouse of a related OEM should be considered third country sales. The sales at issue in the current review are sales to an unrelated customer in Thailand. Bonded warehouse-to-bonded warehouse sales were accepted in the first review, and have not been excluded from the HM database for these final results of review.

**Comment 3:** Torrington contends that NMB/Pelmech Thai and NMB/Pelmech



Singapore improperly excluded sales to related parties from their HM databases. Torrington maintains that the HM databases are deficient, and the Department cannot use the data to calculate dumping margins.

NMB/Pelmec Thai and NMB/Pelmec Singapore argue that they have reported their HM sales in accordance with the Department's requirements. Transfers of merchandise from the manufacturing companies to their related selling branch were not reported as HM sales, because the merchandise was destined to sale to unrelated customers in the home market. Reporting the transfers between the related companies as well as the sale by the selling branch to the first unrelated customer would result in double-counting.

NMB/Pelmec Thai and NMB/Pelmec Singapore state that sales to related parties in the home market for consumption were not reported in the Section C database because the companies were not prepared to show that these sales were made at arm's length. The Department's questionnaire states that related-party sales should not be used in calculating FMV unless those sales are found to be at arm's length. During the original investigation, the Department determined that these sales were not at arm's length. The sales were excluded from the HM database in the original investigation and in the first review.

*Department's Position:* NMB/Pelmec Thai and NMB/Pelmec Singapore properly excluded these sales from the HM database. These sales were excluded from the HM database in the original investigation and the first review, and no new evidence has been produced which would warrant a change in the Department's position on the treatment of these sales.

*Comment 4:* Torrington contends that the Department should assume that two types of sales reported in NMB/Pelmec Thai's and NMB/Pelmec Singapore's HM databases should be excluded because the respondents have not proven that the sales were not in fact destined for the U.S. market. Torrington alleges that sales made in the home market to companies which may have U.S. affiliates, and sales made in U.S. dollars, should be considered as destined for the U.S. market. Torrington states that the Department should make this assumption because the respondents have not provided any proof to the contrary. The burden should be on the respondents to provide sufficient proof that these sales were not destined for the U.S. market.

NMB/Pelmec Thai and NMB/Pelmec Singapore state that they determined

that sales to customers in the home market were intended for HM consumption when there was no contrary indication in any sales documentation. NMB/Pelmec Thai and NMB/Pelmec Singapore did not know, nor had any reason to know, that the bearings were not destined for HM consumption. The fact that a sale was made in U.S. dollars is not proof that the merchandise was destined for export to the United States. The Department addressed this issue in the first review, and found that such sales should not be excluded from the HM database.

NMB/Pelmec also contends that the import statistics used by Torrington to support its claim that sales reported in the HM database were, in fact, sales to the U.S. are inaccurate and misleading.

*Department's Position:* In the first review, the Department determined that, with certain exceptions, sales to HM customers with U.S. affiliates should not be excluded from the HM database. Antifiction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Administrative Review, 56 FR 31692, 31741 (July 11, 1991). The exceptions noted included situations where the manufacturer was informed in advance, or had reason to know of the ultimate destination of the merchandise, through special markings, market-specific specifications, or shipping instructions. There is no evidence on the record in this case which would prove that NMB/Pelmec Singapore or NMB/Pelmec Thai knew, or should have known, whether these goods were destined for consumption in other than the home market. Therefore, we have included these sales in the HM database for these final results of review.

*Comment 5:* Torrington argues that NMB/Pelmec Thai's and NMB/Pelmec Singapore's home markets are not viable, and should not be used as the basis for calculating FMV. Torrington contends that if related-party transactions were included in the viability calculations, the ratio would fall below five percent. The Department correctly determined in the original investigation that related-party transactions should be used in determining viability.

Torrington contends that the Department should obtain information regarding related-party transactions in order to make a viability determination. Furthermore, the Department should exclude from its calculation Route B sales and bonded warehouse-to-bonded warehouse sales, U.S. dollar sales for NMB/Pelmec Thai, and sales to certain HM customers whose merchandise may

have been destined for the United States.

NMB/Pelmec Thai and NMB/Pelmec Singapore state that they have properly reported their sales for determining viability. Transfers of merchandise to the companies' related sales branch for resale to unrelated customers were not reported for viability purposes, but the final sale of the merchandise to an unrelated customer in the home market was reported. To report the transfer to the sales branch would result in a double-counting of the merchandise. Sales of finished bearings to related parties in the home market for consumption were reported as HM sales. Sales of parts to related parties in the home market and third countries which were used to produce finished bearings were not used in the viability calculation, in order to avoid double-counting. Such sales were included in the response to Section A of the questionnaire. NMB/Pelmec Thai and NMB/Pelmec Singapore have demonstrated that even if these sales were included in the viability calculation, the ratio would still be greater than five percent. Sales made directly to unrelated and related customers in the United States were reported. Sales to related and unrelated parties in third countries were reported as third country sales.

*Department's Position:* NMB/Pelmec Thai and NMB/Pelmec Singapore reported their viability information in the same manner as in the first review. NMB/Pelmec Thai and NMB/Pelmec Singapore properly excluded certain sales to related parties from the calculation, because such inclusion would result in double-counting of the merchandise. The Department has accepted respondent's reported sales for viability purposes.

*Comment 6:* Torrington also argues that the number of model matches produced can be used as an indicator of whether the home market is viable. The number of matches produced for NMB/Pelmec Thai suggests that the home market is not viable.

NMB/Pelmec Thai and NMB/Pelmec Singapore state that Torrington's contention that the relative number of model matches produced can be an indicator of HM viability is incorrect. Model matches are produced in order to calculate FMV, and are not a standard for determining viability.

*Department's Position:* The number of model matches produced by a model matching methodology is not related to the determination of viability, but rather the determination of foreign market value. Therefore, the number of model



matches cannot be used as a reliable indicator of viability.

*Comment 7:* Torrington contends that the Department should determine viability for NMB/Pelmech Thai and NMB/Pelmech Singapore based on weight rather than quantity because of the large differences in sizes of the bearings. Torrington argues that a viability ratio based on quantity, such as that supplied by respondents, is inaccurate because of the substantial differences in the possible diameters of the bearings sold. NMB/Pelmech Thai and NMB/Pelmech Singapore argue that they reported their viability ratios based on quantity in accordance with the questionnaire.

*Department's Position:* NMB/Pelmech Thai and NMB/Pelmech Singapore correctly reported their viability ratios based on quantity rather than weight. Respondents are instructed by the questionnaire to use quantity as the basis for the ratio if the number of parts will not have a significant effect on the calculation.

*Comment 8:* Torrington argues that the Department should reject NMB/Pelmech Thai's response and use best information available because the respondent has persistently refused to cooperate with the Department and has demonstrated an inclination to manipulate its reported information to achieve a home market viability determination. Torrington cites NMB/Pelmech Thai's inclusion of Route B sales and bonded warehouse-to-bonded warehouse sales as evidence that the company is disregarding the Department's precedent. The Department should use either the highest rate for any responding firm in the current review or the respondent's margin from the LTFV investigation as best information available.

NMB/Pelmech Thai claims that Torrington's request that the Department use BIA is without merit. NMB/Pelmech Thai has cooperated fully with the Department and has responded completely and in a timely manner to all the Department's requests. The reporting of related-party sales and Route B sales is in accordance with the Department's instructions and precedents.

*Department's Position:* The wholesale application of BIA for NMB/Pelmech Thai would not be warranted in this situation. NMB/Pelmech Thai has cooperated with the Department, and has responded to our questionnaire and supplemental questionnaires fully and in a timely manner.

*Comment 9:* Torrington, NMB/Pelmech Thai and NMB/Pelmech Singapore state that any countervailing duties found by

the Department should be added to the calculated USP.

*Department's Position:* Article VI.5 of the General Agreement on Tariffs and Trade provides that "[n]o . . . product shall be subject to both antidumping and countervailing duties [CVD] to compensate for the same situation of dumping or export subsidization." This provision is implemented by section 772(d)(1)(D) of the Tariff Act.

The current antidumping duty administrative review periods covering antifriction bearings from Singapore and Thailand extend from May 1, 1990 through April 30, 1991. The corresponding countervailing duty administrative review periods extend from January 1, 1990 through December 31, 1990. Because the CVD reviews for the period January 1, 1991 through December 31, 1991 have not yet been completed, we have no concurrent CVD rate for the period January 1, 1991 through April 30, 1991 with which to adjust antidumping duty liability to account for export subsidies for those four months for purposes of assessment. Therefore, we will not issue or forward to the U.S. Customs Service liquidation instructions for entries of the subject merchandise from Thailand or Singapore during that four month period until issuance of the final results of the next countervailing duty reviews.

The antidumping duty cash deposit rate in these reviews will be reduced by the rate attributable to the export subsidies found in the concurrent CVD reviews. That CVD rate for NMB/Pelmech Thai and all other manufacturers, producers and exporters of Thai-origin merchandise is 8.51 percent. Therefore, the adjusted antidumping duty cash deposit rate for NMB/Pelmech Thai and all other manufacturers, producers and exporters will be zero percent. Since the current CVD rate for NMB/Pelmech Singapore and all other manufacturers, producers and exporters of Singapore-origin merchandise is zero percent, we will not adjust the antidumping duty cash deposit rate for NMB/Pelmech Singapore and all other manufacturers, producers and exporters.

For assessment of ESP and purchase price sales from Singapore and Thailand, we will increase the USP by the rates attributable to the export subsidies found in the current CVD reviews. We will calculate the potential uncollected dumping duties (PUDD) using this increased USP.

*Comment 10:* Torrington argues that BIA should be used for NMB/Pelmech Singapore's exports of bearings to U.S. foreign trade zones (FTZs) which were subsequently reexported to third

countries. NMB/Pelmech Singapore did not report sales to related and unrelated customers in FTZs who exported the bearings to third countries. Because NMB/Pelmech Singapore did not provide sufficient information to prove that these bearings did not enter the United States, the Department should presume that these bearings entered U.S. Customs territory. As BIA for the bearings sold to unrelated parties, the Department should use the lowest sale price found by part number, and collect antidumping duties on those sales.

NMB/Pelmech Singapore contends that it properly reported its FTZ sales in accordance with the Department's policies. NMB/Pelmech Singapore reported those sales to a related party which were then sold to a customer in the United States. It did not report exports to related or unrelated parties which were destined for reexport to third countries. This procedure is in compliance with agency precedent and the final results of the first administrative review.

*Department's Position:* The Department accepted NMB/Pelmech Singapore's reporting of these sales in the first administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Administrative Review*, 56 FR 31692, 31704 (July 11, 1991). NMB/Pelmech Singapore has reported these sales in the same manner as in the first review, and there is no evidence on the record to warrant a change in the Department's treatment of these sales. Therefore, the use of BIA is not warranted for the sales at issue.

## 21. Miscellaneous Issues

### A. Verification

*Comment 1:* Torrington criticizes the Department for its failure to conduct full verification of certain respondents for which Torrington had submitted a request for verification. Torrington argues that its requests to verify were based on good cause. In the cases of FAG-Italy and FAG-Germany, Torrington argued that both firms created new cost accounting systems solely for antidumping reporting. In other cases, such as Koyo, NSK, TIE, and certain SKF firms, Torrington claimed that each questionnaire response was unbelievable on its face, and that the Department failed in its obligation to verify by either not verifying at all, or only verifying certain sections of each response.



Torrington further argues that budget and other constraints are legally irrelevant considerations for not verifying when good cause to verify has been shown. As an alternative to on-site verifications, Torrington suggests that respondents send records to the Department, or their local counsel, for verification in Washington.

FAG-Germany and FAG-Italy argue that their cost accounting systems were not deficient and had not been manipulated for the antidumping reviews. On the contrary, FAG-Germany and FAG-Italy assert that their cost accounting systems are essentially the same as those used to prepare the responses which were verified in the original fair value investigations.

The FAG companies, as well as Koyo, NSK, SKF, and TIE all assert that Torrington arguments are meritless and that the Department has fulfilled its statutory verification requirements in these reviews.

**Department's Position:** With respect to administrative reviews, the Department is required to verify information under 19 CFR 353.36(a)(1) if the Secretary decides that good cause for verification exists, or if a request for verification is received from an interested party no later than 120 days after publication of notice of initiation and the Department has not conducted a verification during either of the two immediately preceding administrative reviews.

With respect to these reviews, the Department's decision as to whether there was good cause for verifying a certain response rested on a variety of factors or circumstances. Among the Department's considerations were the volume and significance of a particular firm's shipments from the country under review, the firm's past verification history, and our evaluation of the credibility of the data submitted by that firm in the context of the review under consideration. Since these are the second administrative reviews for AFBs, there are no firms under review which have not been verified in the two previous reviews. Therefore, the Department did not need to consider this requirement for its verification decisions.

Based on our evaluation of all relevant circumstances, we believe our verification efforts did satisfy the requirements of the statute. Furthermore, we believe we satisfied these requirements without needing to conduct verification in Washington, which we prefer not to do, due to the logistical and procedural problems involved.

#### B. Negative U.S. Prices

**Comment 2:** SKF claims that sales with a negative U.S. price were incorrectly included in the denominator of the aggregate margin calculation (which is based on the total PUDD divided by the total USP value). SKF contends that negative USPs should be set to zero for purposes of the margin percentage calculation. SKF argues that using negative USPs to calculate negative sales value totals artificially understates the denominator and, thereby, inflates the margin percentage.

Torrington contends that setting negative USPs to zero is unwarranted since the numerator, or PUDD, is affected by many adjustments claimed by SKF which are obtained by dividing the total expense pool by the total sales. Furthermore, that sales total incorporated all sales, including sales that after adjustment became negative. Therefore, Torrington concludes that the numerator and the denominator should remain consistent. Federal-Mogul asserts that the governing Department regulation, 19 CFR 353.2(f), makes no distinction between positive and negative USPs because to ignore negative USPs would be to ignore part of the reality of the dumping just determined to have been occurring.

**Department's Position:** We agree with Torrington and Federal-Mogul. By setting negative USPs to zero, we would fail to take into account the effect of total adjustments on U.S. sales value and this inconsistency would result in a distorted margin percentage.

#### C. Accuracy of the Home Market Data Base

**Comment 3:** Torrington contends that sales by respondents in the home market to firms with U.S. affiliates should not be used as a basis for foreign market value unless the respondent has demonstrated that these sales were for home market consumption and not for export to the U.S. through the foreign U.S. affiliate. Torrington notes that in the case of certain respondents, inch-size bearings were reported as home market sales, although metric-size bearings are the norm, and in other cases, there were a number of reported home market sales which were exempt from VAT. Torrington cites these circumstances as evidence that the merchandise was destined for export to the United States.

**Department's Position:** Although, in certain cases, sales were made to home market customers that were affiliated with U.S. companies, there was no evidence on the record which would lead us to conclude that this

merchandise was being sold through a related intermediate firm to the United States. There are cases in which a home market original equipment manufacturer (OEM) will purchase inch-size (or metric-size) bearings which are used to make other equipment which is subsequently exported to the United States and other countries. Since these bearings are consumed in the home market in the production of other equipment, we consider these sales to be *bona fide* home market sales. Similarly, a home market OEM customer will receive a VAT tax exemption if it demonstrates to the satisfaction of tax authorities that the bearings will be consumed in the production of equipment destined to be sold for exportation. Therefore, we cannot conclude based on these circumstances alone that AFBs are being sold through intermediaries to the United States. Through certain select verifications, we did investigate the possibility that U.S. sales were being made through intermediaries, but found no evidence that this was happening. Therefore, we did not delete from the home market sales listing any sales to home market customers which were affiliated with U.S. firms. No tax adjustment was made to U.S. price for sales compared to tax-exempt home market sales.

#### D. Service Deficiencies

**Comment 4:** Federal-Mogul argues that the Department should strike from the record in this proceeding, and should not consider, information contained in the case briefs submitted by various respondents because they were served in violation of the Department's regulations controlling manner of service and deadline for completing service. Federal-Mogul cites 19 CFR 353.38(e), which indicates that service of case or rebuttal briefs shall be either by personal service on the same day the brief is filed with the Secretary or by overnight mail or courier on the next day. With respect to the respondents in question, case briefs were served by first class mail and not received by Federal-Mogul up to two days after filing with the Department.

**Department's Position:** We agree with Federal-Mogul that, given the tight time frame between the filing of case briefs and the deadlines for rebuttals, the failure of certain respondents to properly serve case briefs would have placed Federal-Mogul at a serious disadvantage in these proceedings. However, rather than striking case briefs from the record, which would have been within the Department's discretion, we elected to rectify this



disadvantage by allowing Federal-Mogul extra time to file its rebuttal briefs. We took this action in the interest of having all issues resolved on their merits. However, this failure on behalf of certain respondents to follow regulatory requirements did result in a gross imposition on both Federal-Mogul and Department personnel. In a letter of reprimand to all parties in violation of the Department's service requirements, we stated that the Department will no longer tolerate such untimely deliveries to parties in these and other proceedings and will strictly enforce the service requirements.

#### E. Data Base Problems

*Comment 5:* RHP requests that the Department correct two alleged clerical errors in the final results. Both involve an input error for the number of rolling elements reported for a loose ball and inner ring sold to the United States. RHP claims that both errors resulted in the calculation of an inflated CV used as the basis of FMV. These errors were found by RHP in its response after the preliminary results were issued. RHP argues that the Department has consistently held that corrections should be made for obvious clerical errors that can be readily identified from information on the administrative record prior to the preliminary results of review.

Federal Mogul objects to RHP's belated attempt to correct its own "alleged" errors. Federal-Mogul further argues that because RHP makes no effort to ascertain whether any of its submissions contain errors which have benefitted the firm, the Department should not make the changes to the database sought by RHP.

*Department's Position:* With respect to RHP's requested corrections involving number of rolling elements, we were able to determine from available information already on the record that an error had occurred with respect to the loose ball. We corrected this error for these final results. However, with respect to the number of rolling elements for the inner ring, there is conflicting information on the record and we cannot conclude that the initial response contains an obvious error. Cost data for the part number in question shows costs for an outer bearing, an inner ring, and rolling elements, indicating the product is a bearing, not just an inner ring. Therefore, we have not made this correction. This information is also untimely, having been submitted after verifications were completed and publication of our preliminary results, and was not requested by the Department. See

*Asociacion Colombiana de Exportadores de Flores (ASOCOFLORES) v. United States*, 12 CIT \_\_\_\_\_ 704 F. Supp. 1114, 1124 (1989), *aff'd*, 901 F.2d 1089 (Fed. Cir. 1990), *cert. denied*, 111 S.Ct. 136 (1990) (where the Court declined to order correction of a clerical error made by the respondent, where the error was revealed only after verification was concluded).

The Department does have an interest in basing its decisions on accurate information. However, to accept untimely corrections to information in the response, we must be able to assess from information already on the record that an error has been made and that the new information is accurate. In this instance (RHP's inner ring), we cannot determine from the information that was already on the record that the newly submitted data are accurate or that the originally submitted data were not accurate.

*Comment 6:* MBB states that the Department incorrectly compared U.S. dollars to German marks in its preliminary calculations concerning the company and requests that the Department correct this error by converting the German marks into dollars for purposes of the price-to-price comparisons.

*Department's Position:* In the narrative portion of its September 30, 1991 response, MBB explained that its price list data was listed in U.S. dollars. The Department interpreted this to mean that all price list data was in U.S. dollars and based its analysis for the preliminary results on this information. After the preliminary results, MBB informed the Department that the statement in the narrative portion of the response referred only to U.S. price data, and that home market price data was listed in German marks. In addition, MBB noted that the computer format sheets submitted with the narrative did indicate German marks as the proper currency for this data.

Although the Department found MBB's narrative response to be ambiguous, the balance of the response was clear as to the currencies involved. We regard this as an obvious clerical error and made the proper conversions for the final results of review. See Comment 5 above.

*Comment 7:* On March 3, 1992, MBB submitted corrections to its German spherical plain bearing submission eliminating two products from the United States sales listing which were U.S.-origin bearings that were purchased in the United States. MBB requested in its case brief that this correction be made for the final results.

*Department's Position:* Since this correction was properly submitted by MBB prior to the preliminary results, and no objecting comments have been received from other parties, we have made this correction for these final results of review.

*Comment 8:* Torrington states that SKF-Sweden has not properly reported the country of origin for all bearings sold in both the United States and its home market.

SKF-Sweden claims that it has accurately accounted for country of origin using a method that has been thoroughly tested by the Department during the course of various SKF Group verifications.

*Department's Position:* We agree with SKF-Sweden, and find no evidence on the record that the firm's databases are in error with respect to country of origin.

*Comment 9:* Federal-Mogul objects to the fact that NTN-Germany reported all values included in its U.S. sales database in U.S. dollars. Federal-Mogul claims it is apparent that the transfer price itself, which serves as the basis for nearly all of NTN's reported U.S. expenses, is a value recorded in German marks. Therefore, Federal-Mogul contends, all of NTN's expense factors should be applied to a German mark value and converted to U.S. dollars at the exchange rate applicable with respect to each sale. Federal-Mogul urges the Department to recalculate the expense amounts for the purposes of calculating the final results.

*Department's Position:* Federal-Mogul is correct in its assertion that respondents are required to report values in the currency in which they were recorded. However, we disagree with Federal-Mogul's claim that there is evidence on the record which clearly indicates that NTN Bearing Corporation of America paid NTN-Germany in German marks. Therefore, for these final results, we have accepted NTN's transfer price as reported and have not recalculated NTN's reported expenses.

*Comment 10:* Prior to the preliminary results, ADH notified the Department of an error in the data reported for its German cylindrical roller bearing third country sales listing. On March 30, 1992, ADH submitted a computer tape containing a revised third country sales listing for German CRBs. ADH requested that the Department use the corrected computer submission for purposes of calculating the final results.

*Department's Position:* Since this error was brought to our attention prior to our preliminary results, we have allowed ADH to make this correction. We have received no objections from



other parties and have used the corrected data in our calculation of the final results.

**Comment 11:** SNECMA notes that certain credit expenses and warranty costs were inadvertently not reported in its computer submission according to the formulas provided in its narrative questionnaire responses. In addition, SNECMA states that in its supplemental response it explained that certain sales to third country customers were erroneously reported as U.S. sales. However, SNECMA points out that these sales were inadvertently not deleted from its computer submission. SNECMA requests that the Department correct these errors.

**Department's Position:** Because the errors reported by SNECMA consisted of discrepancies between its computer submissions and its narrative questionnaire responses, and we were able to assess from information already on the record that these errors had occurred, we corrected them for our final results.

**Comment 12:** Turbomeca argues that, for certain transactions, it reported total U.S. Customs values and transfer prices instead of per-unit amounts. In addition, Turbomeca asserts that it inputted the wrong acquisition cost for one AFB, and that it reported the wrong gross-unit price for another transaction. Turbomeca requests that the Department correct these errors for the final results.

**Department's Position:** Normally the Department does not correct errors brought to our attention after the preliminary results that are not readily apparent from information already on the record. However, at Turbomeca's disclosure meeting, the Department did request confirmation of certain figures that appeared to be obvious mistakes. Because this information was submitted pursuant to our request and we are satisfied that the data in question was indeed in error, we have accepted Turbomeca's corrections.

**Comment 13:** NTN Corporation (NTN) contends that for the final results of review the Department should use a replacement tape for further manufactured U. S. sales with corrected adjustment data, which was submitted immediately prior to the completion of our preliminary results.

**Department's Position:** We agree and have used the replacement tape in our final results.

**Comment 14:** NTN states that clerical errors in the programming for the preliminary results must be corrected for the final results. The errors pertain to attachment of FMV data to certain U.S. sales, decimal place errors for

constructed value and difference in merchandise data, mathematical errors in the calculation of constructed value, further-manufactured, and certain ESP prices, and the inversion of exchange rate for purchase price customers.

**Department's Position:** We agree and have corrected the errors for the final results.

#### F. Reexports of AFBs

**Comment 15:** NTN-Germany and NTN-Japan note that in the first review, the Department excluded imports of the subject merchandise by a U.S. affiliate of the exporter which are not sold in the United States by that affiliate, but are reexported for sale to other countries. The Department concluded that it did not consider such merchandise to be subject to dumping duties because there is no USP for such merchandise and hence no basis for determining any antidumping duties. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review*, 56 FR 31743 (July 11, 1991).

Based on the Department's conclusion, NTN-Germany and NTN-Japan request that we instruct the U.S. Customs Service to refund any estimated antidumping duties deposited on any such entries of the subject merchandise.

**Department's Position:** If necessary, the refund of any estimated antidumping duty deposits will occur at the time the Department issues assessment instructions. These assessment instructions will be importer-specific and will take into consideration entries of AFBs which were reexported by NTN's U.S. affiliate.

#### G. Scope

**Comment 16:** SKF-Italy cites a March 31, 1992 scope ruling made by the Department which determines that chrome steel balls are outside the scope of the antidumping duty orders on AFBs and requests that the Department exclude from its dumping analysis sales of this merchandise made by SKF Component Systems Co.

**Department's Position:** We agree with SKF-Italy, and have excluded sales of this merchandise from our dumping analysis for these final results of review.

**Comment 17:** Torrington cites a March 13, 1992 scope ruling made by the Department which determines that ceramic bearings are within the scope of the antidumping orders on AFBs, and requests that the Department indicate in the final results notices that these results apply to ceramic bearings.

**Department's Position:** We agree with Torrington and have specifically indicated in the "Scope of the Orders" section of the Issues Appendix that ceramic bearings are subject to these orders. Also, we have separately contacted the U.S. Customs Service and made it fully aware that ceramic bearings are covered by these antidumping orders.

#### H. Basis of Dumping Comparisons for Resellers

**Comment 18:** Peer International (a reseller and exporter of AFBs subject to these orders) and Peer Bearing Company (an unrelated importer of AFBs exported by Peer International) argue that the Department's decision to terminate the review of Peer International (*See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 FR 10868 (March 31, 1992)) is contrary to the intent of the Tariff Act. Both firms argue that the Department's justification for termination (that Peer International's suppliers had knowledge at the time of the sale that the merchandise was destined for the United States and that, consequently, Peer International is not a reseller as defined in 19 CFR 353.2(s) because its sales cannot be used to calculate USP) is erroneous. Both Peer firms argue that the focus of the antidumping law is on the first sale in the United States to an unrelated purchaser, as this price is the price which could conceivably cause injury to the domestic industry. It is further argued that the Department's decision to terminate the review of Peer International effectively means that the Department is ignoring the value at which goods are sold in the United States and the impact that these sales have on U.S. industry. Both firms reason that while there could be an alleged margin of dumping between a Japanese supplier and a Japanese reseller, that price might have no impact upon the U.S. market. However, the price which could possibly cause injury to a domestic market would be the price which Peer Bearing Company (the U.S. importer) pays to its Japanese reseller (Peer International).

Both companies argue that the Department's conclusion that Peer International is not a reseller as defined in 19 CFR 353.2(s), is illogical, has no statutory or regulatory basis, and is devoid of any legal significance. On the contrary, Peer International claims that it fits squarely within the definition of



reseller because it purchases at one price, and resells at a higher price (rather than serving as a commission earning agent). Also, the circumstances of these transactions (Peer Bearing Company had no knowledge of the prices paid to the Japanese suppliers, Peer International's suppliers have no knowledge of the prices between Peer International and Peer Bearing Co., and there is no legal relationship between Peer Bearing Co. and the Japanese suppliers) indicate that Peer International is a reseller, not a mere shipper. Furthermore, both firms argue that under these circumstances, it is proper for the Department to calculate USP on the basis of Peer International's prices to Peer Bearing Co., and FMV on either the CV of this merchandise (using Peer International's cost of acquisition, a ten percent SG&A, and an eight percent profit), or the suppliers' FMVs (with additional deduction from USP for expenses incurred by Peer International to Peer Bearing Co.).

Finally, Peer Bearing Company argues that it has the statutory right to have its entries reviewed and to have the Department issue importer-specific assessment rates.

**Department's Position:** See Comments 30 and 31 in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 FR 31747 (July 11, 1991). Because the Department found in these reviews that all of Peer International's suppliers had knowledge, at the time they sold their merchandise to Peer International, that those sales were destined for the United States, we conclude that the suppliers are effectively acting as exporters, and we use their pricing structure to measure dumping activity. If there is dumping at this point in the sales chain, we generally do not examine the exporter's prices to the United States. Therefore, since under these circumstances the exporter's U.S. prices are not relevant to our comparisons, we cannot conduct an administrative review for that exporter. This is consistent with section 772(b) of the Tariff Act which defines PP sale as a price for exportation to the United States. Where two or more such sales exist, the Department's policy, generally, is to examine the first. For cash deposit purposes, importers purchasing the subject merchandise from Peer International must pay the deposit established for the producer of that merchandise. If no cash deposit was established for such a producer, the importer must pay the applicable "all others" rate at the time of entry. Since

we have terminated this review with respect to Peer International, we will not be issuing importer-specific assessment rates for this firm's importers. Instead, we have instructed the U.S. Customs Service to either await the rates determined for Peer's supplier for this review (if the supplier is under review), or to liquidate entries under the automatic assessment procedures indicated in 19 C.F.R. 353.22(e), if Peer's supplier is not under review.

#### I. Issues Not Briefed

**Comment 19:** According to INA-Germany, in submissions throughout this proceeding, Torrington has made numerous arguments with respect to INA which are not raised in the Torrington case brief. INA cites 19 CFR 353.38(c)(2) as evidence that all prior arguments should be disregarded by the Department as no longer considered relevant by Torrington.

**Department's Position:** The preamble to the provision, 54 FR 12767 (March 28, 1989), states:

The requirement in paragraph (c)(2) \* \* \* that the party separately present in full all arguments to consider in the final determination or final results of review is important given the difficult task the Department often faces at that late date in the investigation or administrative review \* \* \*. If necessary, the party to the proceeding may attach to the case brief as appendices the relevant portions of earlier submissions rather than re-write an entire argument.

We have followed this regulatory provision in addressing the issues raised by Torrington in case briefs regarding INA and the other participants in this administrative review.

#### 22. Administrative Record Issues

**Comment 1:** Torrington argues in its case briefs with respect to SKF-France and SKF-UK that the Department should include all observations of the transaction margin dataset in the administrative record. Torrington notes that as a general matter in the LTFV investigations and in the first reviews, the Department released only the first 25 observations of the actual dumping margin calculations. Torrington requests that although only samples of the margin transaction dataset may be disclosed during the reviews themselves, the entire dataset, with accompanying printouts and computer analysis, should be included in the final administrative record of these reviews.

**Department's Position:** We disagree with Torrington's contention that the documents released following the preliminary results constitute "representative pages" of the margin

calculations. The documents released at disclosure of the preliminary results (and which will be released at disclosure of the final results) reveal the results of review, contain the information required to determine whether the computer program implements the decisions made in these reviews, and constitute a complete representation of the computer analysis performed for the preliminary and the final results.

In addition, the printouts reveal sufficient information to allow interested parties to determine that the margins are calculated using the appropriate data and to check the accuracy of the formulas and values used to determine: (1) The foreign market value, (2) the home market price used for comparison to the cost of production, (3) the cost of production, (4) constructed value, (5) further manufacturing, and (6) U.S. price. The computer log accompanying the program describes the processing steps taken by the computer and reveals the impact of each processing step on the number of observations and variables included in each stage of our analysis.

In order to ensure the transparency of our methods and to demonstrate the accuracy of our calculations, we have incorporated a number of features into the program and printouts released for disclosure and placed in the administrative record.

Each time that we invoked data submitted by respondents, we printed representative pages of that data showing every variable exactly as it was submitted. If we manipulated the data, such as by calculating net price or indirect selling expenses, we created new data fields for those items so that the reader could duplicate our calculations and see both the submitted data and the results of the new calculation.

If we treated certain observations in any part of a dataset differently from the rest of the observations in that dataset, for example, by adjusting the credit rate for some customers and not others, we printed samples of both the adjusted and unadjusted figures, so that interested parties can be assured that the computer appropriately implements our decisions. We printed a list of all existing such or similar matches found in the home market data for more than fifty models sold in the United States in order to demonstrate that model match selections are made as intended.

Finally, we printed the results of each part of our analysis in its entirety. These prints include: (1) The results of the cost test on a model-specific basis, (2) the



complete list of FMVs by model, family, level of trade and time period, (3) the model match selections for each U.S. model by level of trade and time period, (4) the margin calculations for every sale made in the United States, and (5) the cash deposit rate. We printed a complete and exhaustive list of all sales to which we applied a BIA rate. In addition, for the first time, we provided importer-specific assessment rates with both the preliminary and final results, rather than waiting until after the final results are settled and the master lists are issued.

We built a number of cross-checks and references into our program that further reveal how the program implements our policy decisions, and how we have accounted for all relevant information in our analysis. For example, the printouts for the cost test provide a report demonstrating the number of sales above and below cost for each model. We included the total quantity sold and the number of sales reported for each model, as well as the percentage sold above and below cost. We reported the number of months in which each model was sold. As a result, the reader can determine whether sales made below cost in substantial quantities occur over an extended period of time. In one of the final steps of the computer program, the computer log reveals the disposition of all the U.S. sales, such as how many sales were compared to each type of FMV, how many sales generated a margin, or generated no margin or went to BIA. This information can be cross-tabulated with other parts of the program to determine that all U.S. sales have been appropriately accounted for and that our data is internally consistent.

We also note that our sale-by-sale listing of margin calculations for each sale contains the following information: the class or kind of merchandise, a number indicating the sale's observation number in the respondent's original database, the type of sale, whether ESP or PP; the U.S. model name, family name, level of trade, date of sale and the exchange rate in effect on that date; the home market model match selection and the family of the home market model; a code indicating whether the merchandise included in that sale included further manufacturing; and a code indicating the type of FMV used for that sale, such as price to price, CV, CV of the imported merchandise for further processing or BIA. We provided the USP and the amount of any further manufacturing expenses incurred in the United States. We then provided the value of every reported type of FMV for

that model. We listed the difference in merchandise adjustment applicable to that transaction, and revealed the value of all commissions and indirect selling expenses reported in each market in order to demonstrate how the commission cap and ESP adjustments were calculated for each sale. We reported export packing. Finally, we listed the FMV, the margin on the sale, the sale quantity, extended margin, and, for illustrative purposes, the percentage margin on each sale. We further listed all sales in descending order of the cash deposit required for each sale so that all parties may easily determine which sales generate the largest and smallest margins.

As the number and nature of comments concerning clerical errors in the notice reveal, interested parties understood the program well enough to comment on the methodology used to derive our results and to detect clerical errors. There were no allegations that the program did not reveal the policy decisions of the Department or that the structure did not reveal what was happening to the data. The specificity and sophistication of Torrington's own comments indicate its full comprehension of the program; and Torrington fails to mention any specific deficiencies in the transparency of the program; Torrington further fails to explain why the millions upon millions of lines of internally calculated data would further enhance its understanding of our analysis. See Comment 2 in the Cost-Test Methodology section above.

Since these programs fully reveal the methodology employed by the Department, demonstrate the accuracy of our calculations, and were the basis for our dumping margin determinations, we believe that they constitute the complete record of our calculations for the final results of these reviews. We will provide them as disclosure documents of the final results, and for the administrative record. The printouts constitute the sole and complete record of the calculations.

*Comment 2:* Torrington notes that 19 CFR 353.3(a) requires that the record of the proceeding contain all factual information, written argument, and other information developed by, presented to, or obtained by the Department. In its letter of April 15, 1992, Torrington interprets the meaning of information "obtained by" the Department to include printouts of the final dataset and all preceding datasets generated by the internal calculations of the computer in the course of determining the dumping margins. Torrington claims that certain printouts, such as the cost-test results,

may not be adequate to reveal and/or provide sufficient information regarding a problem that can only be discerned from reviewing the status of individual transactions, or from the information provided by the complete listing of all home market sales.

*Department's Position:* We disagree that information "obtained by" the Department includes a printout of all of the internal calculations made by the computer in the process of determining the antidumping duty margins. Those calculations are no more than the electronic implementation of instructions contained in the program. Some parts of the program, such as the cost test, involve hundreds of thousands of simple repetitive steps. Printing each of these individual steps would entail millions of lines of data which is unnecessary to understand the calculation at hand and would not enhance the clarity of the analysis. Furthermore, in its April 15, 1992 comments, Torrington fails to note any substantive deficiencies, inconsistencies, discrepancies or errors in the Department's presentation of the cost-test results, especially since it includes a number of cross checks to demonstrate that the calculations are internally consistent and that all the sales are accounted for.

In its March 25, 1992 memorandum, the Department invited all interested parties to provide suggestions and comments concerning any of the computer printouts provided at the preliminary results. Again, in its case and rebuttal briefs, and in its letter of April 15, 1992, Torrington failed to provide any indication that substantial errors existed or concrete suggestions for improving the printouts at issue. Therefore, the computer printouts issued for disclosure will form the sole and complete record of our calculations in the administrative record of this case.

*Comment 3:* Torrington notes that in litigation arising from earlier administrative reviews of antifriction bearings, the Department took the position that parties should not be granted line-by-line printouts of all datasets generated in the course of the program nor copies of the computer programs used to create the first SAS datasets from the respondents' tapes. Torrington objects to this position, claiming that this information constitutes relevant, essential data which is before the Department and which is intertwined with the final results. In addition, Torrington argues that without this information it will be impossible to predict all of the clerical errors that will be made. Torrington



further claims that, for these final results, the Department intends to provide interested parties with only "representative pages" of the computer printouts rather than all information which interested parties deem potentially essential to litigation.

*Department's Position:* As we noted in our Defendant's Memorandum in Opposition to the Motion of the Torrington Company for a Judicial Protective Order, January 27, 1992, Torrington's request for printouts of all the intermediate datasets generated in the course of the margin calculations constitutes a request for information that does not exist on the record, and is not generated as part of the record for the proceeding. We stated that the Department should not be required to create documentation that is not part of the administrative record and that would need to be specifically generated for the convenience of counsel. We noted that, since counsel had access to computer tapes of respondents' data for the duration of the proceeding, counsel was able to draw distinctions between a number of potentially reasonable approaches and to advocate that the Department adopt those lawful alternatives that best promote their interests. The record of the current reviews of antifriction bearings indicates a strong and vocal advocacy on the part of Torrington with no indications that the computer printout and documents provided at disclosure after the preliminary results hampered

its participation in these reviews in any way.

Finally, in our Memorandum, we noted the daunting administrative burden that would be placed on the Department in complying with a request to generate information which did not exist, for the explicit purpose of counsel's convenience.

Therefore, since we believe that the computer programs released at disclosure constitute the full and unabridged record of the final results of these reviews, and because the statute explicitly restricts judicial review to the record compiled during the administrative proceeding, we are not generating new data for any court record and will include in the record of these final results only the computer printouts released at disclosure.

*Comment 4:* NSK requested that the Department provide it with more complete printouts of its home market and CV datasets. Specifically, NSK requested that the following computer printouts be provided: a complete printout of home market sales detail for a minimum of 50 different part numbers at each level of trade; complete CV detail for a minimum of 50 part numbers, and a separate margin detail limited to further-manufactured merchandise.

*Department's Position:* Due to the extraordinarily large and complex nature of NSK's home market and CV data, and the reasonable nature of its request, we have modified the computer printouts as requested.

*Comment 5:* NTN-Germany notes that, in the first reviews, the Department released the computer program and selected printouts prior to issuance of the final results, thus allowing interested parties to comment on any clerical or programming errors which remained in the program. NTN-Germany suggests that such a prefinal release would promote the calculation of accurate final results and reduce the potential for unnecessary litigation for these reviews as well.

*Department's Position:* Due to the greater transparency of the computer programs used to calculate the margins in these reviews, the nature of the comments received after the preliminary results, and the nominal changes between the preliminary and final results, we believe the extraordinary procedure of a pre-final release of the computer program and printouts is unnecessary for these reviews. Furthermore, the Department's regulations provide parties an opportunity to request disclosure after issuance of the final results and to identify and comment on any clerical errors in the calculations. Since interested parties will not be denied meaningful comment on any clerical errors, we have not released the program or printout prior to the final results.

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# **federal register**

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**Wednesday  
June 24, 1992**

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## **Part IV**

### **Department of Education**

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**34 CFR Parts 361, 363, 376, and 380  
Special Education and Rehabilitative  
Services; State Supported and  
Employment Services Program; Final Rule**



## DEPARTMENT OF EDUCATION

34 CFR Parts 361, 363, 376, and 380

RIN 1820-AA86

**The State Vocational Rehabilitation Services Program; the State Supported Employment Services Program; Special Projects and Demonstrations for Providing Transitional Rehabilitation Services to Handicapped Youth; and Special Projects and Demonstrations for Providing Supported Employment Services to Individuals With Severe Handicaps and Technical Assistance Projects**

AGENCY: Department of Education.

ACTION: Final regulations.

**SUMMARY:** The Secretary amends the regulations implementing the State Supported Employment Services Program authorized under title VI, part C of the Rehabilitation Act of 1973, as amended, in order to clarify certain program requirements and make other changes that are needed to increase program effectiveness and flexibility. The changes to the regulatory provisions contained in these final regulations will advance the national education goal of adult literacy and lifelong learning by assisting individuals with severe handicaps to acquire the knowledge and skills necessary to compete in a global economy. The State Supported Employment Services Program assists individuals with severe handicaps, for whom competitive employment would have been unlikely, to acquire the skills and experience needed to achieve and maintain employment in the community.

The Secretary also amends the regulations implementing the State Vocational Rehabilitation Services Program, the Program of Special Projects and Demonstrations for Providing Transitional Rehabilitation Services to Handicapped Youth, and the Program of Special Projects and Demonstrations for Providing Supported Employment Services to Individuals With Severe Handicaps and Technical Assistance Projects in order to make conforming changes to regulatory requirements in these programs that affect the provision of supported employment services.

**EFFECTIVE DATE:** These regulations take effect either 45 days after publication in the *Federal Register* or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the

effective date will be published in the *Federal Register*.

**FOR FURTHER INFORMATION CONTACT:**

Fred Isbister, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3228 Mary E. Switzer Building, Washington, DC 20202-2899. Telephone: (202) 732-1297. Deaf and hearing impaired individuals may call (202) 732-2848 for TDD services.

**SUPPLEMENTARY INFORMATION:** The State Supported Employment Services Program provides grants to assist States in developing and implementing collaborative programs with appropriate public agencies and private nonprofit organizations to provide rehabilitation services leading to supported employment for individuals with severe handicaps.

The statute defines "supported employment" to mean competitive work in an integrated work setting with on-going support services for individuals with severe handicaps who traditionally have been unable to perform competitive work or who have performed competitive work only intermittently. It includes transitional employment for individuals with chronic mental illness. The on-going support services authorized with Rehabilitation Act funds are time-limited. Individuals in supported employment also need on-going support services of an extended nature to maintain competitive employment in a particular job. These on-going support services are referred to as "extended services" and must be financed from other funding sources.

On November 13, 1991, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the *Federal Register* (56 FR 57778). Major differences between the NPRM and these final regulations are:

(1) The final regulations do not establish in the definition of "competitive work" in § 363.6(c)(2)(i) any specific minimum work requirement that must be met, either at the time of job placement or at transition to extended services, by individuals with severe handicaps who are receiving supported employment services. Instead, the final regulations require, for each individual, that (a) a weekly work goal be separately determined that would maximize the individual's vocational potential at the time of transition; (b) the goal be established in the individualized written rehabilitation program (IWRP); (c) the individual's progress toward meeting the goal be monitored during the period of time-limited services by the State vocational rehabilitation (VR) agency; and (d) transition to extended

services not occur until the individual has substantially met the work goal.

(2) The final regulations permit an individual with severe handicaps to receive time-limited supported employment services from a State VR agency for more than 18 months if the IWRP indicates that longer services are necessary in order for the individual to achieve job stabilization prior to making the transition to extended services. Consistent with the NPRM, the final regulations also authorize, in the definition of "time-limited services" in § 363.6(c)(3), discrete post-employment services following transition, if limited reintervention by a State VR agency is compelled because specific services are needed to maintain the job placement and these services are unavailable from an extended services provider.

(3) The final regulations permit State VR agencies to make exceptions to the requirement for twice-monthly job-site monitoring of all individuals in supported employment, including transitional employment, if the IWRP reflects that off-site monitoring is more appropriate for a particular individual. In these instances, the regulations in § 363.6(c)(2)(iii) establish minimum requirements for off-site monitoring, consisting of at least two meetings with the individual and one employer contact each month.

(4) The regulatory criteria for eligibility of individuals with severe handicaps for supported employment services in § 363.3 have been clarified by adding a requirement that specific consideration be given, in the assessment of employability for determining eligibility for VR services under title I, to whether supported employment is a possible vocational outcome.

(5) The final regulations permit job skills training and other training to be provided by the most appropriate means possible for each individual in supported employment, whether by skilled job coaches or employment specialists, or by other qualified individuals, including co-workers, through natural supports.

(6) The final regulations clarify, in the definitions of "transitional employment" and "on-going support services," that continuing sequential job placements must be provided for individuals in transitional employment, both by the VR agency during the period of time-limited services if needed to enable the individual to achieve job stability and, following transition, by extended services providers until job permanency is achieved.



(7) The final regulations clarify that extended services cannot be funded from grants under the State Vocational Rehabilitation Services Program, the State Supported Employment Services Program, or the Special Projects and Demonstration Programs authorized under section 311 (c) and (d) of the Rehabilitation Act.

(8) The definition of "integrated work setting" has been clarified by (a) specifying that integration means either job interaction by an individual with a severe handicap with nonhandicapped employees at job sites where most employees are not handicapped or job interaction with other non-handicapped individuals, including members of the general public, if the individual works alone or only with other employees who have handicaps; and (b) precluding the job interaction requirement from being satisfied by contact between an individual with a severe handicap and individuals who provide on-going support services at the job site.

#### Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 143 parties submitted comments on the proposed regulations. The letters included comments from State vocational rehabilitation, mental health, and developmental disabilities agencies, private nonprofit agencies and organizations, individuals, and parents of individuals with severe handicaps. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

Major issues are grouped according to subject, with appropriate sections of the regulations referenced in parentheses. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

#### 20-Hour Work Requirement as an Outcome Standard (§ 363.6(c)(2)(i))

*Comments:* Commenters generally supported the proposal to remove the requirement included in the definition of "competitive work" that individuals in supported employment must average a minimum of 20 hours of work per week at the time of job placement. The proposed regulations would have made the "20-hour requirement" an outcome standard that must be met at the time an individual with severe handicaps makes the transition to extended services.

A significant number of comments urged the Department to relax the 20-hour standard even further. Some urged elimination of an hourly requirement, or its reduction to 5, 10, or 15 hours, or

permitting rehabilitation counselors to make exceptions to the standard in order to expand the availability of supported employment to individuals who lack the stamina to work 20 hours per week or who can only be placed in jobs requiring fewer hours of work. Others urged that the hourly minimum issue be addressed in the development of each client's IWRP. These proposals would expand the program's availability to those with more severe handicaps.

*Discussion:* The Rehabilitation Act of 1973 does not impose minimum hour work requirements in any of its rehabilitation programs. Nor does the statutory definition of "supported employment" as "competitive work" necessitate any particular hour minimum. See 29 U.S.C. 706(18). On the other hand, while the State Supported Employment Services Program was intended to assist individuals with severe handicaps, it was also intended to provide substantial employment opportunities. The Secretary agrees with those commenters suggesting that these goals are best served by a more flexible, individualized approach that would allow each individual in supported employment and his or her rehabilitation counselor to establish jointly in the IWRP an hours-per-week work goal that would maximize the individual's vocational potential at the time of transition to extended services. The Secretary also believes such a change would be in keeping with the President's call for regulatory actions that promote economic growth and job creation.

*Changes:* The definition of "competitive work" is revised to delete the 20-hour minimum in favor of an IWRP-determined minimum weekly number of hours at the time of transition to extended services and to make conforming changes in the IWRP and transition requirements in §§ 363.11(e)(2)(ii) and 363.54.

#### Successful Rehabilitation (§ 363.55)

*Comments:* Although some commenters supported the requirement in the NPRM that in order for an individual in supported employment to be considered successfully rehabilitated that individual must maintain a supported employment placement for 60 days after making the transition to extended services, others objected to keeping the VR file open after the State is no longer providing funding support. Some commenters pointed out that an individual must be stabilized in the job at the time of transition to extended services, thus providing reasonable assurance that the placement will last. Other commenters wanted the 60-day

period eliminated because it would delay case closure or would be too prescriptive.

*Discussion:* The Secretary continues to believe there is merit in requiring that an individual be considered successfully rehabilitated, and a case closed on that basis, only if the individual has maintained a job placement at least 60 days after transition to extended services. This requirement would help ensure that extended services are being provided that are adequate to meet the client's needs.

*Changes:* None.

#### Twice-Monthly On-Site Monitoring (§ 363.6(c)(2)(iii)(C))

*Comments:* The NPRM, in its definition of "on-going support services"—the generic term that encompasses both the supported employment services for which title VI (part C), title I, and section 311 grant funds may be used (i.e., "traditionally time-limited post-employment services") and extended services provided by other providers after transition—would require twice-monthly monitoring at the work site of each individual in supported employment. The point of this monitoring is to assess employment stability and, based on that assessment, to coordinate or provide services at or away from the job site in order to achieve and maintain employment stability. This would replace the current requirement that mandates job skill training at least twice monthly for all individuals except those who are chronically mentally ill.

Some commenters lauded this proposed requirement as facilitating timely identification of problems before an individual's job is in jeopardy. However, other commenters objected to a requirement of on-site monitoring, primarily on two grounds: (1) That it is unnecessary; and (2) that individuals with chronic mental illness may feel stigmatized by on-site monitoring, thus impeding their job stability. Other commenters contended that the costs of this twice-monthly requirement, coupled with the shortage of current program resources, would result in States providing supported employment services to fewer numbers of individuals. One commenter wanted on-site monitoring to be based on individual need.

*Discussion:* The Secretary continues to believe that twice-monthly on-site monitoring is the preferred monitoring approach for most individuals in supported employment. However, the Secretary also believes that the regulations should provide enough



flexibility to allow rehabilitation counselors, after consultation with each individual in supported employment, to determine on a case-by-case basis how to best acquire current information relevant to assessing job stability and the individual's needs. If on-site monitoring is not necessary to assess stability, alternative methods of gathering information for the twice-monthly assessment should be permitted. This may take a variety of forms, including telephone calls with supervisors and off-site meetings with the individual in supported employment as well as visits to the work site.

**Changes:** The requirement for twice-monthly on-site monitoring of all individuals in supported employment, including transitional employment, in the definition of "on-going support services" in 34 CFR 363.6(c)(2)(iii)(C), is modified to permit rehabilitation counselors to make exceptions regarding the location of the monitoring if it is determined in the IWRP to be in the best interests of the individual. If off-site monitoring is determined to be appropriate, the regulations require the monitoring, at a minimum, to consist of two meetings with the individual in supported employment and one employer contact each month.

#### Requirements for Transition (§ 363.54)

**Comments:** Several commenters addressed the proposed requirements for transition. One concern raised was the requirement that extended services be provided without a hiatus in services. It was pointed out that in some instances there could be a brief period before extended services begin.

**Discussion:** To serve the interest in long-term job stability for individuals with severe handicaps, which is the purpose of this program, any hiatus in the provision of extended services must be prohibited. If extended services are not immediately available, an individual cannot be transitioned. Twice-monthly monitoring must continue without interruption during extended services.

**Changes:** None.

#### Eligibility (§ 363.3(a))

**Comments:** Most commenters supported the NPRM's clarification that an individual's potential for supported employment must be considered during the eligibility process under title I (i.e., rehabilitation may be feasible because of the option for supported employment). Some commenters argued that the language of the proposed regulations did not adequately reflect that intent. Several commenters also agreed with the NPRM that the unavailability of extended services does

not negate a person's eligibility for supported employment. On the other hand, some commenters strongly objected to the latter point on the ground that a determination of eligibility will lead to hopes and expectations that cannot be realized if extended services are not available.

**Discussion:** The Secretary agrees that the eligibility criteria for this program are not presented as clearly or logically as they should be and that increased emphasis should be given in the final regulations to the requirement that an individual's potential for supported employment must be considered as part of the assessment of employability in determining title I eligibility. Regarding the concern that an eligibility determination should not be separated from the availability of resources, the Secretary believes that individuals with severe handicaps interested in and eligible for, but not provided, supported employment should be given accurate information about why they are not receiving those services. The Secretary also believes that State vocational rehabilitation agencies have an on-going responsibility to continue to search for extended services providers for eligible but unserved individuals in order to maximize the numbers of individuals receiving supported employment services. The Secretary does not believe the current unavailability of extended services should be an impediment to a determination of eligibility for services, but rather should act as a catalyst to promote the identification of new funding sources for extended services.

**Changes:** The Secretary is adding to § 363.3 a requirement that, as a part of the eligibility determination process, the potential for supported employment must be considered as a possible vocational outcome for individuals with severe handicaps. The eligibility criteria have also been reorganized and tightened to eliminate any redundancy.

#### Discrete Post-Transition Services (§ 363.4(c))

**Comments:** Most commenters supported the proposal that made clear that funds under the State Supported Employment Services Program, as well as funds under the title I State Vocational Rehabilitation Services Program, may be used for unanticipated intervention necessary to maintain the job placement after transition. Some commenters asked that the term "discrete post-transition services" be clarified by providing examples of when this limited intervention can occur. Other commenters found the term "post-transition services" confusing and

suggested that the title I term "post-employment services" be substituted.

**Discussion:** The Secretary is concerned that this provision not undercut the requirement for extended services to be funded from sources other than title VI (part C), title I, or section 311 monies and agrees that examples of the kinds of services the Secretary considers discrete would be helpful. The Secretary does not believe this authority should be used in situations of underemployment or if extensive retraining would be required. The Secretary concurs that the phrase "post-transition services" should be changed to be more compatible with language used in the title I program.

**Changes:** The regulations are revised to reference job station redesign, repair and maintenance of assistive technology, and replacement of prosthetic and orthotic devices as examples of discrete post-transition services and to clarify that title I, title VI (part C), or section 311 funds may be used for these purposes once transition has occurred. The regulations are also revised to substitute the phrase "discrete post-employment services following transition" for the phrase "discrete post-transition services."

#### Job Skills Training (§ 363.4(c)(1))

**Comments:** Commenters generally applauded the NPRM's recognition that some individuals in supported employment may not need job skills training but instead may need other services. Other commenters, however, apparently misunderstood the proposed removal of job skills training as a requirement for all individuals in supported employment except those with chronic mental illness, believing mistakenly that job skills training would no longer be authorized under the regulations for other disability populations.

Some commenters also suggested that the regulations should continue to recognize the need for professional job coaches or employment specialists. A few of these commenters wanted the regulations to require job skills training to be provided only by job coaches or employment specialists. Other commenters wanted the regulations broadened to permit training by other qualified individuals through natural supports.

**Discussion:** The Secretary continues to believe that job skills training and other training may not be needed by all individuals in supported employment. If needed, however, these services must be among the on-going support services that are furnished. The Secretary also



believes that job skills training and other training should be available from a variety of different providers and should be furnished to each individual who needs it by the most appropriate means. This would include training from skilled job coaches or employment specialists as well as from other qualified individuals, including co-workers, through natural supports.

**Changes:** Section 363.4(c)(1) is revised to authorize—(i) intensive on-the-job skills training and other training provided by skilled job trainers, co-workers, or other qualified individuals; and (ii) other services specified in 34 CFR 361.42 that are needed in order to maintain job stability.

**Relabeling "Traditionally Time-Limited Post-Employment Services" (§§ 363.4(c) and 363.6(c)(3))**

**Comments:** To avoid confusion with post-employment services provided under title I, some commenters recommended clarifying the statutory phrase "traditionally time-limited post-employment services."

**Discussion:** The Secretary agrees that the use of the words "traditionally" and "post-employment" are confusing and unnecessary if referring to the time-limited services funded under the State Supported Employment Services Program.

**Changes:** The term "traditionally time-limited post-employment services" is changed to "time-limited services" to distinguish it more clearly from the term "extended services" and from post-employment services that are provided under title I to individuals who are in job placements other than supported employment.

**Definition of On-Going Support Services (§ 363.6(c)(2)(iii)(C))**

**Comments:** Commenters pointed out that on-going support services for transitional employment include not only services throughout the individual's term of employment in a particular job placement but services to enable an individual to progress from one transitional job placement to another in order to achieve and maintain permanent employment.

**Discussion:** The Secretary agrees with this comment and believes this issue needs to be clarified in the regulations.

**Changes:** Section 363.6(c)(2)(iii)(C) is revised to make clear that multiple placements may be provided under a program of transitional employment.

**Time Limit of 18 Months (§ 363.6(c)(3))**

**Comments:** Some commenters urged elimination of the 18-month limit on the provision of supported employment

services by VR agencies, contending that some individuals with severe handicaps may not yet have achieved job stability and would be unable to make the transition to extended services.

**Discussion:** While the Secretary believes the regulations should contain some benchmark or standard for limiting VR support under this program, additional flexibility is warranted in order to permit States to provide services for a longer period of time if it is determined necessary and appropriate in order to achieve job stabilization for a particular individual in supported employment.

**Changes:** The 18-month limitation is amended to permit States to extend services on a case-by-case basis as determined necessary in the IWRP.

**Extended Services (§ 363.6(c)(4))**

**Comments:** Some commenters believed that the definition of extended services in § 363.6(c)(4) permits title I dollars or funds received for community-based supported employment demonstration projects to be used for this purpose. Other commenters objected to the IWRP requirement that time-limited services cannot be initiated if the extended services provider has not been identified. Other commenters wanted the VR agency to pay for extended services.

**Discussion:** The definition should be revised to make clear that title I, title VI (part C), and section 311 (c) and (d) demonstration dollars may not be used for extended services. The Secretary continues to believe that extended services should be arranged for before the provision of time-limited services by the VR agency in order both to protect individuals from the cessation of required services and to safeguard the Federal investment in supported employment.

**Changes:** The definition of "extended services" is revised to prohibit title VI (part C), title I, and section 311 (c) and (d) demonstration dollars from being used to fund extended services in accordance with statutory and regulatory requirements.

**Job Stabilization (§ 363.54)**

**Comments:** Some commenters asked that the term "job stabilization," which is a requirement for transition to extended services, be defined in the regulations.

**Discussion:** The Secretary does not believe it is necessary or desirable to regulate on this issue because job stabilization must be individually determined for each individual in supported employment. The phrase

"stabilized in the job" in § 363.54 is considered common parlance and needs no further explanation in the regulations. It refers to the situation where an individual in supported employment is performing satisfactorily all job duties and is reasonably expected to continue that level of performance.

**Changes:** None.

**Supplementary Title VI (Part C)—Funded Evaluation (§ 363.4(a))**

**Comments:** Some commenters questioned why a supplementary title VI (part C)-funded evaluation of rehabilitation potential would be needed if the title I-funded evaluation of rehabilitation potential, which must be provided first, is used to establish program eligibility.

**Discussion:** The Secretary believes that a supplementary title VI (part C)-funded evaluation would be needed only infrequently and should be provided only in those limited circumstances when additional information is needed in order to determine the most suitable supported employment placement for an individual or to determine what on-site supports are needed, including the need for rehabilitation technology. It might also be used if any reassessment of the suitability of the placement is warranted or if an individual's medical condition changes.

**Changes:** Section 363.4(a) is revised to provide examples of some circumstances in which a supplementary title VI (part C)-funded evaluation would be appropriate.

**Transitional Employment (§ 363.6(c)(2)(iv))**

**Comments:** A number of issues were raised about transitional employment. Some commenters argued that VR agencies should not fund transitional employment because it is temporary. Some commenters wanted the regulations to authorize transitional employment for disability populations in addition to individuals who are chronically mentally ill. Other commenters were concerned that the definition of transitional employment in § 363.6(c)(2)(iv), which requires continuous temporary job placements until job permanency is achieved, limited VR support during time-limited services to only the initial job placement. On the other hand, some commenters urged that the VR agency should pay for only one transitional employment placement. Some commenters were concerned that the definition of transitional employment requires job permanency as the outcome



of this services model. Finally, some commenters urged that the 18-month limit on VR agency funding of transitional employment be deleted because transitional employment takes longer.

**Discussion:** Transitional employment is an authorized supported employment model for individuals with chronic mental illness because it is included within the statutory definition of "supported employment." With respect to the availability of transitional employment to other disability populations, the Secretary notes that this particular supported employment model was authorized by statute only for individuals with chronic mental illness. The Secretary does not believe there is adequate evidence of benefit at this time to warrant regulatory expansion of this services model to other populations. With respect to the concern that, under the NPRM's language, VR agencies can fund only one transitional employment placement, the Secretary acknowledges that the definition has caused confusion and needs revision. The Secretary agrees that VR agencies can and should fund multiple, sequential temporary placements with title VI (part C), title I, or section 311 dollars if necessary to enable the individual to achieve job stability and make the transition to extended services. The Secretary believes the outcome of transitional employment must be a permanent job placement. The definition should recognize that many short-term placements may occur until this goal is achieved. Finally, as with other supported employment, the VR agency in accordance with these final regulations can grant an exception to the 18-month limit if it is determined to be necessary and appropriate as part of the IWRP.

**Changes:** The definition of transitional employment is revised to clarify that responsibility for placements after the first placement is the responsibility of the VR agency during the period of time-limited services, and thereafter by extended services providers. This clarification is made by substituting the term "on-going support services" for the term "extended services" in the definition. Other clarifying changes are made to better distinguish transitional employment, which consists of a series of temporary sequential job placements, from the generic supported employment model in which placements are expected to be permanent.

#### **Integrated Work Setting (§ 363.6(c)(2)(ii))**

**Comments:** A variety of comments were made about the definition of

"integrated work setting" in § 363.6(c)(2)(ii). A few commenters asked that current regulatory language be retained that indicates that a single integrated placement in work settings where most workers do not have handicaps is the preferred type of integration. This language was proposed for removal in the NPRM because the Secretary does not want to favor a single placement over a group placement, provided both involve an integrated work setting. A few commenters supported increasing the size of work groups of only individuals with handicaps from 8 persons to 12, although a majority of commenters who addressed this issue supported no change in this area. One commenter asked for clarification of the meaning of "regular contact" in that part of the definition where an individual with handicaps works alone or only with other individuals with handicaps but is required, for purposes of integration, to have regular contact with non-handicapped individuals in the immediate work setting.

**Discussion:** The Secretary does not support any statement in the regulations that indicates a preference for one type of permissible integrated work setting over another. Nor does the Secretary believe that there is justification for increasing above eight persons the size of work groups composed solely of individuals with handicaps. The Secretary agrees that the definition of "integrated work setting" could be clarified, but does not believe any substantive change is warranted.

**Changes:** The definition of "integrated work setting" has been clarified by (1) substituting the word "employees" for "co-workers"; (2) permitting an individual with a severe handicap to be part of a work group of only individuals with handicaps as long as the work group does not consist of more than eight employees; (3) requiring job interaction with non-handicapped employees at job sites if most employees are not handicapped or job interaction with other non-handicapped individuals, including members of the general public, if the individual works alone or works only with other employees who have handicaps; and (4) precluding the job interaction requirement from being satisfied by personnel who provide on-going support services at the job site.

#### **Timing of Regulatory Revisions**

**Comments:** A few commenters questioned the merit of regulatory revision in this program at this time, pointing out that the Rehabilitation Act is being reauthorized this year.

**Discussion:** There is strong support in the rehabilitation community for revising these regulations as soon as possible to provide additional program flexibility. In addition, the Secretary believes the final regulations promote economic growth by supporting the training and placement into competitive employment of increased numbers of individuals with severe handicaps. The Secretary does not believe the programmatic improvements made in these final regulations are incompatible with the reauthorization process. For these reasons, the Department notified Congress last fall that we would proceed with revision of regulatory requirements under this program.

**Changes:** None.

#### **Reapplication for Services**

**Comments:** Commenters strongly supported the clarification in the preamble to the NPRM that individuals who have been rehabilitated in supported employment may reapply for services with State VR agencies if they lose a job or are in need of an upgrade.

**Discussion:** The Secretary agrees that any individual who has lost a supported employment placement or is underemployed may reapply for additional rehabilitation services. If the individual meets program eligibility requirements and other requirements that apply to the receipt of supported employment services, it would be appropriate for State VR agencies to reinstitute supported employment services by opening a new case.

**Changes:** None.

#### **Executive Order 12291**

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

#### **Intergovernmental Review**

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.



**List of Subjects****34 CFR Part 361**

Grant programs—education, Individuals with disabilities, Vocational rehabilitation, State plan.

**34 CFR Part 363**

Grant programs—education, Individuals with severe disabilities, Supported employment, Vocational rehabilitation, State plan.

**34 CFR Part 376**

Grant programs—education, Youths with disabilities, Transition, Vocational rehabilitation, Demonstration projects.

**34 CFR Part 380**

Grant programs—education, Individuals with severe disabilities, Supported employment, Vocational rehabilitation, Demonstration projects.

Dated: June 18, 1992.

(Catalog of Federal Domestic Assistance Numbers: 84.128 The State Vocational Rehabilitation Services Programs; 84.187 The State Supported Employment Services Program; 84.128 Special Projects and Demonstrations for Providing Transitional Rehabilitation Services to Handicapped Youth; and 84.128 Special Projects and Demonstrations for Providing Supported Employment Services to Individuals with Severe Handicaps and Technical Assistance Projects.)

Lamar Alexander,  
Secretary of Education.

The Secretary amends parts 361, 363, 376, and 380 of title 34 of the Code of Federal Regulations as follows:

1. Part 363 is revised to read as follows:

**PART 363—THE STATE SUPPORTED EMPLOYMENT SERVICES PROGRAM**

**Subpart A—General**

Sec.

- 363.1 What is the State Supported Employment Services Program?
- 363.2 Who is eligible for an award?
- 363.3 Who is eligible for services?
- 363.4 What are the authorized activities under a State Supported Employment Services grant?
- 363.5 What regulations apply?
- 363.6 What definitions apply?

**Subpart B—How Does a State Apply for a Grant?**

- 363.10 What documents must a State submit to receive a grant?
- 363.11 What information and assurances must be included in the State plan supplement?

**Subpart C—How does the Secretary Make a Grant?**

- 363.20 How does the Secretary allocate funds?

- 363.21 How does the Secretary reallocate funds?

**Subparts D–E—[Reserved]**

**Subpart F—What Post-Award Conditions Must Be Met by a State?**

- 363.50 What collaborative agreements must the State develop?
- 363.51 What are the allowable administrative costs?
- 363.52 What are the information collection and reporting requirements?
- 363.53 What special conditions apply to services and activities under this program?
- 363.54 What requirements must a State meet before it provides for the transition of an individual to extended services?
- 363.55 What are the requirements for successfully rehabilitating an individual in supported employment?

Authority: 29 U.S.C. 795j–g, unless otherwise noted.

**Subpart A—General**

**§ 363.1 What is the State Supported Employment Services Program?**

Under the State Supported Employment Services Program, the Secretary provides grants to assist States in developing and implementing programs of supported employment services for individuals with severe handicaps.

(Authority: 29 U.S.C. 795j)

**§ 363.2 Who is eligible for an award?**

Any State is eligible for an award under this program.

(Authority: 29 U.S.C. 795m(a))

**§ 363.3 Who is eligible for services?**

A State may provide services under this program to any individual with severe handicaps who—

(a) Has not worked, or has worked only intermittently, in competitive employment;

(b) Has been determined on the basis of an evaluation of rehabilitation potential, including a consideration of whether supported employment is a possible vocational outcome, to meet the eligibility criteria for the State Vocational Rehabilitation Services Program in 34 CFR 361.31; and

(c) Has a need for on-going support services in order to perform competitive work.

(Authority: 29 U.S.C. 795k)

**§ 363.4 What are the authorized activities under a State Supported Employment Services grant?**

Under this program, the following activities are authorized:

(a) Evaluation of the rehabilitation potential for supported employment of individuals with severe handicaps. Any evaluation must be supplementary to an

evaluation of rehabilitation potential done under 34 CFR part 361 and may be provided only after an individual's eligibility for the State Vocational Rehabilitation Services Program has been determined. This supplementary evaluation may be provided in circumstances such as the following:

(1) Additional information is needed in order to determine the most suitable supported employment placement for an individual or to determine what on-going support services are needed, including the need for rehabilitation technology.

(2) A reassessment of the suitability of the placement is warranted.

(3) There is a change in the individual's medical condition.

(b) Development of and placement in jobs for individuals with severe handicaps.

(c) Provision of time-limited services that are needed to support individuals with severe handicaps in employment, such as—

(1) Intensive on-the-job skills training and other training provided by skilled job trainers, co-workers, and other qualified individuals, and other services specified in 34 CFR 361.42 in order to achieve and maintain job stability;

(2) Follow-up services, including regular contact with employers, trainees with severe handicaps, parents, guardians or other representatives of trainees, and other suitable professional and informed advisors in order to reinforce and stabilize the job placement; and

(3) Discrete post-employment services following transition that are unavailable from an extended services provider and that are necessary to maintain the job placement, such as job station redesign, repair and maintenance of assistive technology, and replacement of prosthetic and orthotic devices

(Authority: 29 U.S.C. 795n)

**§ 363.5 What regulations apply?**

The following regulations apply to the State Supported Employment Services Program:

(a) The Education Department general Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 76 (State-Administered Programs).

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).



(5) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(6) 34 CFR part 82 (New Restrictions on Lobbying).

(7) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(8) 34 CFR part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this part 363.

(c) The following regulations in 34 CFR part 361 (The State Vocational Rehabilitation Services Program): §§ 361.31; 361.32; 361.33; 361.34; 361.35; 361.39; 361.40; 361.41; 361.42; 361.47(a); 361.48; and 361.49.

(Authority: 29 U.S.C. 795j and 711(c))

#### § 363.6 What definitions apply?

(a) *Definitions in 34 CFR part 361.* The following terms used in this part are defined in 34 CFR 361.1(c)(2):

Act  
Designated State unit  
Individual with handicaps  
Individual with severe handicaps  
State plan

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Fiscal year  
Nonprofit  
Private  
Secretary  
State

(c) *Other Definitions.* The following definitions also apply to this part:

(1) *Supported Employment* means—  
(i) Competitive work in an integrated work setting with on-going support services for individuals with severe handicaps for whom competitive employment—

(A) Has not traditionally occurred; or  
(B) Has been interrupted or intermittent as a result of severe handicaps; or

(ii) Transitional employment for individuals with chronic mental illness.

(2) As used in the definition of "supported employment"—

(i) *Competitive work* means work that at the time of transition is performed weekly on a full-time basis or on a part-time basis, as determined in each individualized written rehabilitation program, and for which an individual is compensated consistent with the wage standards provided for in the Fair Labor Standards Act;

(ii)(A) *Integrated work setting* means job sites where either—

(1)(i) Most employees are not handicapped; and

(ii) An individual with a severe handicap interacts on a regular basis, in

the performance of job duties, with employees who are not handicapped; and

(iii) If an individual with a severe handicap is part of a distinct work group of only individuals with handicaps, the work group consists of no more than eight individuals; or

(2) If there are no other employees or the only other employees are individuals who are part of a work group as described in paragraph (A)(1)(iii) of this definition of "integrated work setting," an individual with a severe handicap interacts on a regular basis, in the performance of job duties, with individuals who are not handicapped, including members of the general public.

(B) The interaction required by paragraphs (A)(1)(ii) and (A)(2) of this definition of "integrated work setting" may not be satisfied by contact between an individual with a severe handicap and individuals who provide on-going support services at the job site;

(iii) *On-going support services* means services that are—

(A) Needed to support and maintain an individual with severe handicaps in supported employment;

(B) Based on a determination by the designated State unit of the individual's needs as specified in an individualized written rehabilitation program; and

(C) Furnished by the designated State unit from the time of job placement until transition to extended services, except as provided in § 363.4(c)(3) and, following transition, by one or more extended services providers throughout the individual's term of employment in a particular job placement or multiple placements if those placements are being provided under a program of transitional employment. On-going support services must include, at a minimum, twice-monthly monitoring at the work site of each individual in supported employment to assess employment stability, unless the individualized written rehabilitation program provides for off-site monitoring, and, based upon that assessment, the coordination or provision of specific services, at or away from the work site, that are needed to maintain employment stability. If off-site monitoring is determined to be appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month;

(iv) *Transitional employment* means a series of temporary job placements in competitive work in an integrated work setting with on-going support services for individuals with chronic mental illness. In transitional employment, the provision of on-going support services must include continuing sequential job

placements until job permanency is achieved.

(3) *Time-limited services* means on-going support services provided by the designated State unit with funds under this part—

(i) For a period not to exceed 18 months, unless a longer period to achieve job stabilization has been established in the individualized written rehabilitation program, before an individual with severe handicaps makes the transition to extended services; and

(ii) As discrete post-employment services following transition in accordance with § 363.4(c)(3).

(4) *Extended services* means on-going support services provided by a State agency, a private non-profit organization or any other appropriate resource, from funds other than funds received under this part, part 361, part 376, or part 380, after an individual with severe handicaps has made the transition from State vocational rehabilitation agency support.

(Authority: 29 U.S.C. 706(18), 711(c), and 795j)

#### Subpart B—How Does a State Apply for a Grant?

##### § 363.10 What documents must a State submit to receive a grant?

To receive a grant under this part, a State must submit to the Secretary, as part of the State plan under 34 CFR part 361, a State plan supplement that meets the requirements of § 363.11.

(Authority: 29 U.S.C. 7951(c) and 795m(a))  
(Approved by the Office of Management and Budget under control number 1820-0593)

##### § 363.11 What information and assurances must be included in the State plan supplement?

Each State plan supplement must include the following:

(a) *Designated State agency.* Designate the State unit or units for vocational rehabilitation services identified in the State plan submitted under 34 CFR part 361 as the State agency or agencies to administer this program.

(b) *Results of needs assessment.* Summarize the results of the needs assessment of individuals with severe handicaps conducted under title I of the Act of the extent that assessment identifies the need for supported employment services. The results of the needs assessment must address the coordination and use of information within the State relating to section 618(b)(3) of the Individuals with Disabilities Education Act.

(c) *Quality, scope, and extent of services.* Describe the quality, scope,



and extent of supported employment services to be provided to individuals with severe handicaps under this program. The description must address the timing of the transition to extended services referred to in § 363.50(b)(2).

(d) *Distribution of funds.* Describe the State's goals and plans with respect to the distribution of funds received under § 363.20.

(e) *Assurances.* Provide assurances that—

(1) An evaluation of rehabilitation potential, as defined in section 7(5) of the Act, is provided under 34 CFR part 361, and, only if necessary, a supplementary evaluation under this part for each individual with severe handicaps who receives services under this program is provided;

(2) An individualized written rehabilitation program as specified in 34 CFR 361.40 and 361.41 will be developed, either under this part or under 34 CFR part 361, that—

(i) Specifies the services to be provided to each individual served under this program, including a description of the extended services needed, an identification of the State, Federal, or private programs or other resources that will provide the continuing support, and a description of the basis for determining that continuing support is available; and

(ii) Provides for periodic monitoring to ensure that each individual with severe handicaps is making satisfactory progress toward meeting the weekly work requirement established in the individualized written rehabilitation program by the time of transition to extended services;

(3) Services provided to individuals under this program will be coordinated with the individualized written rehabilitation program or education plan as required under section 102 of the Act, section 123 of the Developmental Disabilities Act of 1984, and sections 612(4) and 614(5) of the Individuals with Disabilities Education Act;

(4) The State will conduct periodic reviews of the progress of individuals assisted under this program to determine whether services provided to those individuals should be continued, modified, or discontinued;

(5) The designated State agency or agencies will expend no more than five percent of the State's allotment for administrative costs of carrying out this program;

(6) The State will make maximum use of services from public agencies, private nonprofit organizations, and other appropriate resources in the community to carry out this program;

(7) The public participation requirements of section 101(a)(23) of the Act are met;

(f) *Collaboration.* Demonstrate evidence of collaboration by and funding from relevant State agencies, private nonprofit organizations, or other sources to provide on-going support services following the termination of time-limited services under this part.

(g) *Other information.* Contain any other information and be submitted in the form and in accordance with the procedures that the Secretary may require.

(Authority: 29 U.S.C. 795m)

(Approved by the Office of Management and Budget under control number 1820-0593)

### Subpart C—How Does the Secretary Make a Grant?

#### § 363.20 How does the Secretary allocate funds?

The Secretary allocates funds under this program in accordance with section 633(a) of the Act.

(Authority: 29 U.S.C. 7951(c))

#### § 363.21 How does the Secretary reallocate funds?

The Secretary reallocates funds in accordance with section 633(b) of the Act.

(Authority: 29 U.S.C. 7951(b))

### Subparts D-E—[Reserved]

### Subpart F—What Post-Award Conditions Must Be Met by a State?

#### § 363.50 What collaborative agreements must the State develop?

(a) A designated State unit must enter into one or more written cooperative agreements or memoranda of understanding with other appropriate State agencies, private nonprofit organizations, and other available funding sources to ensure collaboration in a plan to provide supported employment services to individuals with severe handicaps.

(b) A cooperative agreement or memorandum of understanding must, at a minimum, specify the following:

(1) The time-limited services to be provided by the designated State unit with funds received under this part.

(2) The extended services to be provided by relevant State agencies, private nonprofit organizations, or other sources following the termination of time-limited services under this part.

(3) The estimated funds to be expended by the participating party or parties in implementing the agreement or memorandum.

(4) The projected number of individuals with severe handicaps who will receive supported employment services under the agreement or memorandum.

(Authority: 29 U.S.C. 795m(b)(4) and 795n(b))  
(Approved by the Office of Management and Budget under control number 1820-0593)

#### § 363.51 What are the allowable administrative costs?

(a) *Administrative costs-general.* Expenditures are allowable for the following administrative costs:

(1) Administration of the State plan supplement for this program.

(2) Planning, program development, and personnel development to implement a system of supported employment services.

(3) Monitoring, supervision, and evaluation of this program.

(4) Technical assistance to other State agencies, private nonprofit organizations, and businesses and industries.

(b) *Limitation on administrative costs.* Not more than five percent of a State's allotment may be expended for administrative costs for carrying out this program.

(Authority: 29 U.S.C. 7951(c) and 795m(b)(5))

#### § 363.52 What are the information collection and reporting requirements?

(a) A State shall collect and report information as required under section 13 of the Act for each individual with severe handicaps served under this program.

(b) The State shall collect and report separately information for—

(1) Supported employment clients served under this program; and

(2) Supported employment clients served under 34 CFR Part 361.

(Authority: 29 U.S.C. 712 and 795o)

(Approved by the Office of Management and Budget under control number 1820-0593)

#### § 363.53 What special conditions apply to services and activities under this program?

Each grantee shall coordinate the services provided to an individual under this part and under 34 CFR Part 361 to ensure that the services are complementary and not duplicative.

(Authority: 29 U.S.C. 795n and 795q)

#### § 363.54 What requirements must a State meet before it provides for the transition of an individual to extended services?

A designated State unit must provide for the transition of an individual with severe handicaps to extended services no later than 18 months after placement in supported employment, unless a longer period is established in the



individualized written rehabilitation program, and only if the individual has made substantial progress toward meeting the hours-per-week work goal provided for in the individualized written rehabilitation program, the individual is stabilized in the job, and extended services are available and can be provided without a hiatus in services.

(Authority: 29 U.S.C. 795n and 711(c))

**§ 363.55 What are the requirements for successfully rehabilitating an individual in supported employment?**

An individual with severe handicaps who is receiving supported employment services is considered to be successfully rehabilitated if the individual maintains a supported employment placement for 60 days after making the transition to extended services.

(Authority: 29 U.S.C. 711(c))

**PART 361—THE STATE VOCATIONAL REHABILITATION SERVICES PROGRAM**

2. The authority citation for part 361 continues to read as follows:

Authority: 29 U.S.C. 711(c), unless otherwise noted.

3. In § 361.1, a new paragraph (b)(3) is added and paragraph (c)(2) is amended by revising the definitions of "Competitive work", "Integrated work setting", and "On-going support services", removing the definition of "Transitional employment for individuals with chronic mental illness" and adding, in its place, the definition of "Transitional employment", and adding in alphabetical order new definitions of "Extended services" and "Time-limited services" to read as follows:

**§ 361.1 The State vocational rehabilitation services program.**

(b) \* \* \*

(3) The following regulations in 34 CFR part 363 (The State Supported Employment Services Program):

§§ 363.54 and 363.55.

(c) \* \* \*

(2) \* \* \*

*Competitive work*, as used in the definition of "supported employment," means work that at the time of transition is performed weekly on a full-time basis or on a part-time basis, as determined in each individualized written rehabilitation program, and for which an individual is compensated consistent with the wage standards provided for in the Fair Labor Standards Act.

*Extended services* means on-going support services provided by a State

agency, a private non-profit organization or any other appropriate resource, from funds other than funds received under this part, part 363, part 376, or part 380, after an individual with severe handicaps has made the transition from State vocational rehabilitation agency support.

(Authority: Section 635(b) of the Act; 29 U.S.C. 795n)

*Integrated work setting.* (i) As used in the definition of "supported employment," "integrated work setting" means job sites where either—

(A) (1) Most employees are not handicapped; and

(2) An individual with a severe handicap interacts on a regular basis, in the performance of job duties, with employees who are not handicapped; and

(3) If an individual with a severe handicap is part of a distinct work group of only individuals with handicaps, the work group consists of no more than eight individuals; or

(B) If there are no other employees or the only other employees are individuals who are part of a work group as described in paragraph (i)(A)(3) of this definition, an individual with a severe handicap interacts on a regular basis, in the performance of job duties, with individuals who are not handicapped, including members of the general public.

(ii) The interaction required by paragraphs (i)(A)(2) and (i)(B) of this definition may not be satisfied by contact between an individual with a severe handicap and individuals who provide on-going support services at the job site.

*On-going support services*, as used in the definition of *supported employment*, means services that are—

(i) Needed to support and maintain an individual with severe handicaps in supported employment;

(ii) Based on a determination by the designated State unit of the individual's needs as specified in an individualized written rehabilitation program; and

(iii) Furnished by the designated State unit from the time of job placement until transition to extended services, except as provided in 34 CFR 363.4(c)(3) and, following transition, by one or more extended services providers throughout the individual's term of employment in a particular job placement or multiple placements if those placements are being provided under a program of transitional employment. On-going support services must include, at a minimum, twice-monthly monitoring at the work site of each individual in

supported employment to assess employment stability, unless the individualized written rehabilitation program provides for off-site monitoring, and, based upon that assessment, the coordination or provision of specific services, at or away from the work site, that are needed to maintain employment stability. If off-site monitoring is determined to be appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month.

*Time-limited services* means on-going support services provided by the designated State unit with funds under this part—

(i) For a period not to exceed 18 months, unless a longer period to achieve job stabilization has been established in the individualized written rehabilitation program, before an individual with severe handicaps makes the transition to extended services; and

(ii) As discrete post-employment services following transition in accordance with 34 CFR 363.4(c)(3).

(Authority: Section 635(c) of the Act; 29 U.S.C. 795n)

*Transitional employment* means a series of temporary job placements in competitive work in an integrated work setting with on-going support services for individuals with chronic mental illness. In transitional employment, the provision of on-going support services must include continuing sequential job placements until job permanency is achieved.

4. Section 361.41 is amended by revising paragraphs (b)(1) and (b)(2) and adding a new paragraph (b)(3) to read as follows:

**§ 361.41 The individualized written rehabilitation program: Content.**

(b) \* \* \*

(1) A description of the time-limited services to be provided by the State unit not to exceed 18 months in duration, unless a longer period to achieve job stabilization has been established in the individualized written rehabilitation program or discrete post-employment services following transition are provided in accordance with 34 CFR 363.4(c)(3);

(2) A description of the extended services needed, an identification of the State, Federal, or private programs or other resources that will provide the continuing support, and a description of the basis for determining that continuing



support is available in accordance with 34 CFR 363.11(e)(2)(i); and

(3) A description of the results of periodic monitoring to ensure that each individual with severe handicaps is making satisfactory progress toward meeting the weekly work requirement established in the individualized written rehabilitation program by the time of transition to extended services in accordance with 34 CFR 363.11(e)(2)(ii).

5. Section 361.43 is amended by revising paragraph (a)(4) to read as follows:

**§ 363.43 Individuals determined to be rehabilitated.**

(a) \* \* \*

(4) Determined to have achieved and maintained a suitable employment goal for at least 60 days. For individuals with severe handicaps placed in supported employment, the employment goal must be maintained for at least 60 days following transition to extended services in accordance with 34 CFR 363.55.

**PART 376—SPECIAL PROJECTS AND DEMONSTRATIONS FOR PROVIDING TRANSITIONAL REHABILITATION SERVICES TO HANDICAPPED YOUTH**

6. The authority citation for part 376 is revised to read as follows:

Authority: 29 U.S.C. 777a(c), unless otherwise noted.

7. Section 376.1 is amended by removing the word "support" and adding, in its place, the word "supported".

8. Section 376.3 is amended by adding a new paragraph (c) to read as follows:

**§ 376.3 What regulations apply to this program?**

(c) The regulations in 34 CFR 380.20.

(Authority: Secs. 12(c) and 311(c); 29 U.S.C. 711(c) and 777a(c))

9. Section 376.4 is revised to read as follows:

**§ 376.4 What definitions apply to this program?**

(a) The definitions in 34 CFR part 369.  
(b) The definition of "Supported employment" in 34 CFR part 363.

(c) The definitions of "Competitive work", "Integrated work setting", "On-going support services", "Transitional employment", and "Time-limited services" in 34 CFR part 380.

(d) The following definitions also apply to this program:

(1) *Extended services* means on-going support services provided by a State agency, a private non-profit organization

or any other appropriate resource, from funds other than funds under this part, part 361, part 363, or part 380, after an individual with severe handicaps has made the transition from project support.

(2) *Handicapped youth* means any handicapped child who is between the ages of 12 and 26.

(3) *Transitional rehabilitation services* means any vocational rehabilitation services available under the State plan for vocational rehabilitation services under 34 CFR part 361 or the State plan for independent living services under 34 CFR part 365 and may also include—

- (i) Jobs search assistance;
- (ii) On-the-job training;
- (iii) Job development, including work-site modification and use of advanced learning technology for skills training; and
- (iv) Follow-up services for individuals placed in employment.

(Authority: Secs. 12(c) and 311(c), 29 U.S.C. 711a(c) and 777(c))

**PART 380—SPECIAL PROJECTS AND DEMONSTRATIONS FOR PROVIDING SUPPORTED EMPLOYMENT SERVICES TO INDIVIDUALS WITH SEVERE HANDICAPS AND TECHNICAL ASSISTANCE PROJECTS**

10. The authority citation for part 380 continues to read as follows:

Authority: 29 U.S.C. 711(c) and 777a(d), unless otherwise noted.

11. Section 380.5 is amended by revising paragraph (a)(6) to read as follows:

**§ 380.5 What activities may the Secretary fund under community-based supported employment projects?**

(a) \* \* \*

(6) Provision of time-limited services for individuals placed in employment.

12. Section 380.9 is amended by revising paragraph (c) to read as follows:

**§ 380.9 What definitions apply?**

(c) *Other definitions.* The following definitions also apply to this part:

(1) As used in the definition of "supported employment"—

(i) *Competitive work* means work that at the time of transition is performed weekly on a full-time basis or on a part-time basis, as determined in each individual's program of services, and for which an individual is compensated consistent with the wage standards provided for in the Fair Labor Standards Act;

(ii) (A) *Integrated work setting* means job sites where either—

(1) (i) Most employees are not handicapped; and

(ii) An individual with a severe handicap interacts on a regular basis, in the performance of job duties, with employees who are not handicapped; and

(iii) If an individual with a severe handicap is part of a distinct work group of only individuals with handicaps, the work group consists of no more than eight individuals; or

(2) If there are no other employees or the only other employees are individuals who are part of a work group as described in paragraph (A) (1) (iii) of this definition of "integrated work setting," an individual with a severe handicap interacts on a regular basis, in the performance of job duties, with individuals who are not handicapped, including members of the general public.

(B) The interaction required by paragraphs (A) (1) (ii) and (A) (2) of this definition of "integrated work setting" may not be satisfied by contact between an individual with a severe handicap and individuals who provide on-going support services at the job site;

(iii) *On-going support services* means services that are—

(A) Needed to support and maintain an individual with severe handicaps in supported employment;

(B) Based on a determination by the grantee of the individual's needs as specified in a program of services; and

(C) Furnished by the grantee from the time of job placement until transition to extended services, except as provided in 34 CFR 363.4(c)(3) and, following transition, by one or more extended services providers throughout the individual's term of employment in a particular job placement or multiple placements if those placements are being provided under a program of transitional employment. On-going support services must include, at a minimum, twice-monthly monitoring at the work site of each individual in supported employment to assess employment stability, unless the individual's program of services provides for off-site monitoring, and, based upon that assessment, the coordination or provision of specific services, at or away from the work site, that are needed to maintain employment stability. If off-site monitoring is determined to be appropriate, it must, at a minimum, consist of two meetings with the individual and one contact with the employer each month; and

(iv) *Transitional employment* means a series of temporary job placements in



competitive work in an integrated work setting with on-going support services for individuals with chronic mental illness. In transitional employment, the provision of on-going support services must include continuing sequential job placements until job permanency is achieved.

(2) *Time-limited services* means on-going support services provided by the grantee with funds under this part—

(i) For a period not to exceed 18 months, unless a longer period to achieve job stabilization has been established in the individual's program of services, before an individual with severe handicaps makes the transition to extended services; and

(ii) As discrete post-employment services following transition in accordance with 34 CFR 363.4(c)(3).

(3) *Extended services* means on-going support services provided by a State agency, a private non-profit organization or any other appropriate resource, from funds other than funds received under this part, part 361, part 363, or part 376 after an individual with severe handicaps has made the transition from project support.

(Authority: 29 U.S.C. 777a(d))

13. Part 380 is amended by adding a new subpart C consisting of § 380.20 to read as follows:

**Subpart C—What Post-Award Conditions Must Be Met by a Grantee?**

**§ 380.20 What requirements must a grantee meet before it provides for the transition of an individual in supported employment?**

A grantee must provide for the transition of an individual with severe handicaps to extended services no later than 18 months after placement in supported employment, unless a longer period is established in the individual's program of services, and only if the individual has made substantial progress toward meeting his or her hours-per-week work goal, is stabilized in the job, and extended services are available and can be provided without a hiatus in services.

(Authority: 29 U.S.C. 777a(d))

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# Registered Federal Reporter

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**Wednesday  
June 24, 1992**

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**Part V**

**Department of  
Justice**

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**Office of Juvenile Justice and  
Delinquency Prevention**

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**Missing Children's Assistance Act; Final  
Program Priorities for Fiscal Year 1992;  
Notice**



## DEPARTMENT OF JUSTICE

Office of Juvenile Justice and  
Delinquency PreventionMissing Children's Assistance Act;  
Notice of Final Program Priorities for  
Fiscal Year 1992

**AGENCY:** Office of Juvenile Justice and Delinquency Prevention; Office of Justice Programs, Justice.

**ACTION:** Notice of final priorities for Fiscal Year 1992 Research, Demonstration, and Service Program and merit selection criteria under the Missing Children's Assistance Act.

**SUMMARY:** The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is publishing its Fiscal Year 1992 final program priorities for making grants and contracts under section 405 of title IV (the Missing Children's Assistance Act) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5775. Actual program solicitations will be published within 30 days and application kits will be available at that time.

**ADDRESSES:** All inquiries should be directed or sent to: Director, Missing and Exploited Children's Program, Office of Juvenile Justice and Delinquency Prevention, 833 Indiana Avenue NW., Washington, DC 20531.

**FOR FURTHER INFORMATION CONTACT:** Darlene Brown, Program Specialist, at the above address. Telephone (202) 307-5911.

**SUPPLEMENTARY INFORMATION:** Responsibility for establishing annual research, demonstration, and service program priorities and criteria for making grants and contracts pursuant to section 405 of the Missing Children's Assistance Act rests with the Administrator of the Office of Juvenile Justice and Delinquency Prevention. For FY 1992, 12 new programs, two new awards for continuing programs, and a program funded jointly by OJJDP and the National Institute of Justice (NIJ), to be administered by NIJ, will constitute all final section 405 priority funding areas. The Administrator is hereby announcing these final priorities.

During FY 1992 other new programs, or continuations of currently funded programs, may also be funded under sections 404 and 408 of the Missing Children's Assistance Act, 42 U.S.C. 5773 and 5778. Solicitations to fund all new title IV assistance awards in amounts exceeding \$50,000 will be announced in the *Federal Register* and competitively awarded. Described below are discretionary programs being planned for funding under section 405 of

the Missing Children's Assistance Act. Thereafter, OJJDP will publish in the *Federal Register* and make available for distribution a document including full program announcements of those programs labeled "new programs" and the application kit.

Continuing Programs With a New  
Award*Missing and Exploited Children  
Comprehensive Action Program (M/  
CAP). Up to \$1,100,000*

This is a continuing program which requires a new award. The original award was for three years. The Missing and Exploited Children Comprehensive Action Program (M/CAP) serves communities by helping them develop coordinated, cooperative procedures for prevention and handling of missing, exploited and abused children's cases among the various institutions involved. The M/CAP program will be expanded to facilitate the development of additional sites, including developing host sites which will assist in the replication of the program in satellite and affiliate sites. New program staff and training specialists will be added, as well as at least one technical writer who will develop training monographs and specialized curriculum. Through the work of the crime analysis units of the program sites, the M/CAP program will publish a number of monographs and technical assistance bulletins on specialized topics.

*Investigation and Prosecution of  
Parental Abduction Cases. \$200,000*

This is a continuing program which requires a new award. The purpose of this project is to address the legal, jurisdictional and administrative issues faced by prosecutors in cases of parent and family abductions. Conducted by the National District Attorney's Association (NDAA), the first stages of this project produced legal research, including (1) a review of relevant case law and statutes, (2) the collection and review of existing information on prosecutorial handling of family abductions and related issues, and (3) a survey of prosecutors to identify effective approaches for addressing issues in the area; a trial manual; and a training curriculum for prosecutors responsible for handling family abduction cases. The project provided training and technical assistance to prosecutors as well as multidisciplinary teams and developed and disseminated materials to facilitate replication of effective approaches for investigating and prosecuting parental abduction cases.

A new award will be given to build upon and expand the parental abduction training for prosecutors projects. The grantee will develop and provide training on the national, state and local levels for prosecutors and investigators. Technical assistance will be made available to prosecutors on an individual basis. The project strategy also calls for the development of additional educational and informational materials which can be disseminated to the field.

## New Programs

*A Study to Explore Legal Issues and  
Barriers to Using Schools, Public  
Service Agencies, and Hospitals in  
Locating Missing Children. \$125,000*

This project will involve studying the legal issues and obstacles now facing parents, attorneys, law enforcement agencies, prosecutors and missing children clearinghouses in gaining the cooperation of schools, hospitals and other public agencies in the search for missing children. Abduction cases, particularly family abductions, involve many different types of situations and motivations. In many cases, the effort to strike a balance between the need to locate and recover a child and the issues of confidentiality and right to privacy is problematic. Particular attention will be given to battered women's shelters, as well as mental health professionals and other nonlegal professionals working in the public or private sector for whom there are critical confidentiality and right to privacy issues.

This study will attempt to identify the case law and legislation present at the Federal level, as well as State and local levels, that impact on these issues. An examination will be made of certification, licensing criteria, and professional standards of conduct. Also, the project should present suggested remedies and recommend solutions where appropriate and feasible.

*A project to Examine Newspaper  
Articles on Non-Family Child  
Molestation, Exploitation, and Abuse  
Cases. \$125,000*

Currently there is no national data collection focused on the number of children who are sexually abused by non-family members or non-day-care givers each year. Due to reporting methods, the lack of uniformity and definition of charges, and the lack of national data, it is difficult to know how many of these cases of child molestation involve the abduction of children, including short-term abductions. Through the National Center for Missing



and Exploited Children, an informal project was developed utilizing newspaper clippings detailing confirmed cases of child molestation by non-family members collected from over forty major media markets over a four month period. The first month's clippings alone yielded over 800 cases. Data was compiled from the clippings on 32 case characteristics, including the ages of the offenders and the victims, the occupation of the offenders, the relationship between victim and offender, the number of victims, previous arrest history, involvement of child pornography, probationary status of the offender, and the arresting charges.

This new program will be modeled on the earlier short-term project and will involve tracking data on a more expansive basis and over a one-year period in order to include the school and vacation cycle. Data gathered should include types of charges, number of offenses, and characteristic information about both victims and perpetrators. Particular attention should be paid to examining these reports for abduction offenses and arresting charges.

The prospective grantee should plan to utilize the best available sources, including computer networks, newspaper clipping services, or other methods to obtain the necessary information. In all cases, duplication should be monitored so that cases of national proportion are not entered into the data base more than once. The resulting report should include basic information about the populations served by the new sources utilized. After the compilation of cases for one year are entered, they should be summarized and analyzed. The analysis is not expected to generalize the problems of non-family sexual abuse, molestation and exploitation. The grantee may also examine police and prosecutors' data in actual cases in selected sites to compare non-reported cases with reported cases and to assess the accuracy of individual news accounts. The final report should also identify potential alternative data collection methods and approaches which could be utilized for future study of the incidence of non-family, non-caregiver sexual abuse and exploitation of children.

*"Families of Missing Children: Psychological Consequences and Promising Interventions": A Study To Resurvey the Respondents in the Original Study, \$150,000*

The purpose of this resurvey is to determine how lasting are the psychological effects of family and non-family abductions and serious runaway

episodes on victims and families. The findings of the initial "Psychological Consequences" project indicated that it is appropriate to identify two traumas rather than the one associated with each missing child incident. The initial trauma arises when the child is taken, but there is a second trauma at the time of resolution, the recovery of a body or a child. This second trauma appears to be equal to or more profound than the first.

Since the two events, abduction and recovery, could not be separated by the passage of considerable time due to the time constraints of the project period, many cases had not been resolved at the time of the last data collection. Further data collection, after either one year or 18 months, would increase the size of the post-resolution sample and provide better information on the second trauma.

*Justice System Processing of Child Maltreatment Cases. (A Jointly Supported Study With the National Institute of Justice) \$250,000*

Approximately 2.5 million cases of suspected child maltreatment were reported in 1990. These increasing numbers tax both child protective services and the justice system and demand improvements in the social service and legal response to the problem. While many child maltreatment cases are handled by child protective service agencies, the more serious cases come to family and domestic relations courts for the protection of the child, and an increasing number involve charging the perpetrator with a criminal offense. An indication of the increasing demand of these cases on prosecutors is seen in the results of a recent survey in which 90 percent of the prosecutors report child victim cases as a factor in the rising number of felony cases filed in recent years.

A number of past efforts have addressed the effects of child testimony on sexually abused children, explored sexual abuse case processing issues, examined the police role, and discussed state-of-the-art child abuse investigation and prosecution methods. These efforts provide a part of the background for the development of this project on the tracking of child maltreatment cases from the point of official justice system entry to disposition. Prospective case studies would track cases, victims, and perpetrators through law enforcement, prosecution, and courts to case dispositions. The goals of the project would be to provide a description of the nature and dynamics of the justice system response to child maltreatment and to inform policy and improve

practice regarding the handling of these cases in the child protection and justice systems.

OJJDP has transferred funds to the National Institute of Justice for this multi-site study. The project is jointly supported by NIJ and OJJDP. The solicitation was issued by NIJ and the closing date for receipt of proposals was May 27, 1992.

*Model Sentencing and Custody Guidelines in Parental Abduction Cases, \$125,000*

Recent OJJDP-sponsored studies on the legal obstacles to the recovery of parentally abducted children and on the psychological impact of abduction on children and families show that child victims of family abductions experience more trauma and long-term disturbances than is commonly believed. One study found that almost eighty percent of abducting parents were motivated by anger and revenge against the other parent and attempted to use their children to control and attack the opposing parent. Some parents were fleeing abuse directed at either themselves, their child, or both and needed protection. Regardless of whether an abduction is prompted by frustration with unsatisfactory custody or visitation arrangements or by a desire to punish or control the other parent, many abducting parents intentionally or unintentionally inflict serious emotional or physical harm upon their children. OJJDP-sponsored studies indicate that few abductors are being prosecuted or are receiving sentences of any kind. Consequently, in many jurisdictions, law enforcement involvement in these cases is infrequent and inconsistent. Legal outcomes differ greatly from state to state. Guidelines should be developed so that judges have information that would enable them to identify and address a wide range of cases with varying motivations and consequences to the child. Examples of the factors to be considered include changing a child's name, depriving the child of stable schooling, physical or sexual abuse, emotional and physical (including medical) neglect, and lying to the child by telling it that the other parent does not want it or is dead. The information should be specifically directed to the complex concerns facing judges and court personnel, such as the types of situations in which abduction is likely to reoccur, a history of domestic violence exists, there are circumstances in which child custody might be granted to the abducting parent, and what visitation options and circumstances guiding them will be permitted after the recovery of



the child. Along with development and testing of training for judges, the project would develop a bench book for judges as well as a series of articles for publication and dissemination to judges and prosecutors.

*Model Treatment Approaches and Training Materials for Mental Health Professionals Working with Families of Missing Children, \$200,000*

"The Families of Missing Children: The Psychological Consequences and Promising Interventions" study found that the vast majority of families of missing and recovered children do not receive any mental health services even though the experience of having a child abducted inflicts significant trauma upon the victim and the family members left behind. Only a limited number of criminological and psychological studies have specifically addressed missing children and their families. Previous studies have generally reported that there are profound negative effects that result from the missing experience. While the severity of trauma suffered by victims and families of non-family abduction is more easily recognizable, children and left-behind parents involved in parental abductions also suffer high levels of trauma and long-term distress. Geoffrey L. Greif and Rebecca L. Hegar (School of Social Work, University of Maryland at Baltimore), authors of an article entitled "Parents Whose Children are Abducted by the Other Parent: Implications for Treatment", based upon a national survey, reported that children are usually abducted by a parent during or after the breakup of a marriage or relationship. As a consequence, in addition to the trauma ensuing from the loss of the child, the parent must also deal with other stressful factors stemming from the marital or relationship breakup. The literature review conducted in conjunction with this study found that there is a dearth of experience and knowledge and almost no research on abduction trauma and reactions of families to having a child abducted. Thus, parents who do seek mental health assistance are not likely to find a therapist with any experience in either non-family or family abduction trauma.

Given the void in experience, information, and research on the psychological trauma associated with child abduction, the purpose of this program is to develop, test, and refine model treatment approaches and training materials for use by mental health professionals in stabilizing family units upon recovery of missing children, and supporting the members of these

family units and the returned child to recover effectively from the associated emotional trauma. While the desirability of developing research-based treatment approaches is irrefutable, given the immediate need for professionally structured treatment programs, the strategy anticipated for development of these model programs anticipates an eclectic approach. Program models should be developed which are based upon a combination of treatment approaches which have been determined to be effective in cases involving child protection, family violence, gross family dysfunctioning, court ordered placement of children, familial incest, and marital conflict accompanied by serious violence. Treatment with families of soldiers missing in action should also be explored to determine if effective approaches were developed.

The end product should be the development of two to three model treatment approaches which can be tested in the second and third years of a three year project period, along with replication manuals, training curricula, and articles for publication.

*Program to Develop Techniques for Interviewing Adolescent Victims of Sexual Exploitation and Sexual Abuse, up to \$125,000*

Interviewing adolescent victims of sexual abuse and exploitation requires particular skills and techniques. There is little literature or training available in the field to instruct law enforcement personnel and medical and direct service providers on how to conduct interviews with the adolescent victim. However, individual practitioners in various police, prosecutorial, health, or related agencies have developed considerable proficiency in dealing with young victims. Their expertise could be harnessed to train others. In order to expand the availability of information and training in this area, OJJDP will sponsor an assessment of existing training resources and of further training needs pertaining to this topic. The project should cover the protocol for conducting the interviews and the distinctions between the first responder interview, the investigative interview, and the therapeutic interview. Joint investigative interviewing by law enforcement personnel and child protective services should also be addressed. The material is expected to cover: (1) Interviewing techniques, including types and purposes; (2) essential elements of sexual exploitation and abuse investigations; and (3) essential elements of adolescent psychology and behavior. The grantee is

expected to draw on the expertise of experienced law enforcement investigators and others who have developed special skills in interviewing adolescent victims. End products would include a training curriculum and monograph, as well as a listing of resources and practitioners with particular expertise, all of which could be added to existing investigative training courses.

*Resource Handbook of Victim Services and Assistance for Missing and Exploited Children and Their Families, \$60,000*

"The Families of Missing Children: The Psychological Consequences and Promising Interventions" study found that the vast majority of families of missing and recovered children do not receive mental health services or other victims services and resources even though the experience of having a child abducted inflicts significant trauma upon both the victims and the family members left behind. Families of missing and recovered children can (1) enhance their personal, marital, and family stability during this crisis when they know what constitutes expected or normative reactions of child loss; (2) improve the parent-child relationship when they know the child's experience during the event and after recovery; and (3) insure their understanding of ongoing needs of the non-missing children in the family when they know sibling reaction to child loss. This project would develop and publish a specialized handbook designed to enable families and victims to recognize the personal needs and the needs of their family members and to identify and access services available on a local, State, and national basis. This publication will include information on the types of victim compensation, e.g., local, State and federal funding, a listing of national support organizations for families and victims, as well as information on selecting a therapist. Dissemination of this publication to families of missing children will be primarily through the National Center for Missing and Exploited Children, missing children State clearinghouses, and other public and private organizations serving child victims and their families.

*Symposium on International Child Abductions, \$200,000*

The Hague Convention is an international treaty governing the return of internationally abducted children. It was negotiated in 1980 and has been ratified by a number of countries, including the United States in 1988. The



Hague Convention sets international policy condemning parental abduction and seeks promptly to restore children to their pre-abduction circumstances, thus limiting the harm they suffer as a result of the abduction. It also provides international laws and procedures for the resolution of these difficult disputes. Despite the adoption of the Hague Convention by many countries and the success in recovering children under the convention, international child abduction still poses complicated problems for parents, governments and other agencies involved in the location and recovery of these children. There is a lack of knowledge and information about recovering children under the Hague Convention and other resources available to assist in international child abduction cases. The grantee would work cooperatively with the U.S. Department of State's Office of Consular Services, the National Center for Missing and Exploited Children, Interpol, and others to convene a forum of practitioners to examine current issues regarding international abductions, the obstacles for locating and recovering abducted children in a world-wide arena, and progress in the adoption and implementation of the Hague Convention. The symposium should be planned for mid-1993 to follow an international meeting of representatives of Hague Convention Central Authorities scheduled for January of 1993. An expected outcome of this forum would be the publication of a series of reports indicating directions for future study, training and information dissemination.

*A Program To Develop Training, Technical Assistance and Product Resources Based Upon the Findings of OJJDP's Congressionally Mandated Study on the "Legal Obstacles to the Recovery and Return of Parentally Abducted Children", \$300,000*

The three key obstacles to the recovery of parentally abducted children identified in the interim Congressional report were: (1) Lack of knowledge of applicable law on the part of judges and attorneys; (2) lack of compliance, even when knowledgeable; and (3) lack of uniformity and specificity in State laws. The final report, due in June of 1992, will make recommendations for removing legal obstacles and improving interstate and inter-jurisdictional cooperation in parental abduction cases. This project would develop materials for different audiences and create cooperative arrangements with existing organizations to disseminate these materials, including training materials.

Target audiences would include parents, lawyers, judges, law enforcement personnel, prosecutors, and public and private missing children's organizations. Training could also focus on utilizing a multi-agency approach to parental abduction cases. Model State statutes would also be developed and disseminated and would possible include a conference for State legislative staffs.

Specific products would be a written bench book for judges, a booklet of practice tips for attorneys in family law, information for parents on how best to cooperate with their lawyers, development of a written protocol for law enforcement for both civil and criminal cases, a fifty State directory of relevant State statutes and case law (on disk), and possibly written procedures for establishing a child custody registry. In addition, assistance needs to be available to left-behind parents so that they can find attorneys who can adequately and knowledgeably represent them. The program would develop a directory and possibly a nationwide attorney referral system specific to parental abductions and enforcement of child custody orders.

*A Program To Develop and Disseminate a Series of Training Videos on Basic Techniques for Investigating Missing, Exploited and Abused Child Cases for Law Enforcement, \$200,000*

The vast majority of law enforcement agencies employ less than ten officers. These law enforcement officers have few opportunities or resources to receive specialized training in the investigation of child maltreatment cases. In order to provide needed information to these smaller departments, OJJDP plans to develop an integrated training course package which would include a series of training videotapes on the investigation of such child maltreatment issues as physical abuses, sexual abuse, missing children (including parental abductions), exploited children, offender profiles, and child fatalities. This project would also design and implement a plan for regional, and possibly national, dissemination, utilizing cable and teleconferencing networks. Related topics to be addressed in training videotapes would include cases management, techniques for interviewing child victims and suspects, and interacting with social service, medical, and mental health professionals. The curriculum would focus on basic information and techniques. In addition to the series of training videotapes, there would be a small publication or pocket card listing national and regional resources for law

enforcement agencies on available training, information, and technical assistance on cases of abused, exploited, and missing children.

*Funding Support for Specific Program Development for Missing Children State Clearinghouses, up to \$250,000*

The goal of this project is to assist State missing children clearinghouses to strengthen their role within their State through the development of specific projects relating to missing and exploited children. These projects could include programs such as the development of a statewide listing of investigators specializing in missing and/or exploited child cases; the development and implementation of a training curriculum designed for law enforcement personnel on investigating missing child cases, including utilizing and interfacing with their State clearinghouse, community education and prevention programs; or the development of a network of volunteers within the State who have experience and background in providing services for the parents of missing or exploited children. OJJDP will also consider submissions of original programs designed to improve the service capabilities of the State clearinghouse.

OJJDP anticipates providing several grants to individual clearinghouses to develop the special programs and products detailed above. The grantees would be encouraged to develop their programs in formats which could serve as models for other State clearinghouses around the country.

#### *Discussion of Comments*

In response to the Federal Register Notice of March 18, 1992, OJJDP received 19 letters. Most (17) of the letters specifically recommended continuation of the parental abduction prosecution project. One letter supported the case tracking study begin proposed jointly by OJJDP and NIJ, and this letter was forwarded to NIJ for review. One organization was generally favorable towards the overall program while making suggestions for improvements in a number of specific programs. OJJDP is very appreciative of these thoughtful comments and will take into account all suggestions and recommendations. Specific changes will be reflected in the forthcoming solicitations for proposals.

*Comment:* 17 letters recommended that OJJDP continue to fund without disruption specific training for prosecutors and investigators on handling family abduction cases. All of the respondents commented on the great



need for information and training in this area and mentioned that this is the only national project providing technical assistance and high quality training for prosecutors and investigators.

**OJJDP response:** For the past three years, OJJDP funded the National District Attorney's Association (NDAA) to develop training and technical assistance for prosecutors in the area of parental abductions. OJJDP believes this project has been a valuable program and plans to continue to provide specialized training for prosecutors and investigators. OJJDP agrees to provide new funding in fiscal year 1992 in order to ensure continuity for this program.

**Comment:** OJJDP received one letter commenting upon the project to explore legal issues and barriers to using schools, public service agencies and hospitals in locating missing children. It suggested that OJJDP not make the assumption that these legal barriers should be overcome and allow for the need to also respect the intent of policies providing confidentiality and rights to privacy. It suggested that battered women's shelters be included as a type of public agency to be examined, as well as issues relating to the confidentiality of nonlegal professionals working in the private or public sector, such as mental health professionals. It also suggested that this project include legal research on Federal and State laws impacting on these issues and an examination of certification and licensing criteria and professional standards of conduct.

**OJJDP response:** OJJDP concurs that the focus of this project should allow for a balance between the need to locate and recover a child and the issues of confidentiality and the right to privacy. This balance is appropriate and essential given the varied nature of family abductions.

**Comment:** One respondent questioned the necessity for funding a resurvey of the original subject families included in the "Psychological Consequences" study.

**OJJDP response:** The recently completed "Psychological Consequences" study produced relevant findings regarding the nature of the trauma and stress experienced by children and families involved in abductions and some runaway episodes. The study indicated that these families often experienced two traumas, one related to the actual abduction and period when the child was gone and a second trauma at the time of recovery or resolution. These findings point out the need for training and resources for mental health professionals who may assist these victims and families, a

project also included in the proposed priorities for FY 1992 (see "Model Treatment Approaches and Training Materials for Mental Health Professionals Working with Families of Missing Children"). What is unknown, however, is how long these families experience distress following the abduction and resolution. Due to the limited follow-up period of the psychological impact study, a number of the cases were unresolved at the time the project ended. OJJDP believes there is value in continuing to query these families to see how long lasting are the effects and to assess the implications for long-term treatment.

**Comment:** One respondent suggested that OJJDP expand the project to provide support for State missing children clearinghouses by providing training for staff and personnel.

**OJJDP response:** Through the National Center for Missing and Exploited Children (NCMEC) and other OJJDP-supported research and demonstration projects, training and technical assistance is being provided to State missing children clearinghouses. A project is underway to provide computer technology to the State clearinghouses which will link them to each other and NCMEC. OJJDP also plans to establish computer age-progression labs in selected State clearinghouses. The project described in this program plan will provide direct funding support to selected clearinghouses to strengthen or expand their capabilities by development of specific programs which could also serve as model programs for other State clearinghouses.

**Comment:** One respondent commented that none of the priorities relates to the problem of family violence and missing children and suggested that it is an area which deserves greater attention.

**OJJDP Response:** OJJDP's strategy is to address the issues of family violence within the context of all relevant current and future programs, including research, demonstration, and training and technical assistance programs for professionals with responsibilities for missing child cases. In particular, two studies funded in FY 1991 are examining carefully the issues of domestic violence in parental abduction cases. They include a study of risk factors and promising interventions in parental abduction cases and a project which provides an additional analysis of the original "National Incidence Study on Missing, Abducted, Runaway, and Thrownaway Children" (NISMART) data. In addition, the Parental Abduction Prosecution Project is currently producing a monograph on

issues relating to investigation and prosecution of cases involving allegations of child abuse and domestic violence. Before funding any other major projects relating to these issues, OJJDP would like to examine the initial findings of studies and projects currently underway. Another FY 1991 grant to the nonprofit organization, Child Find, Inc., which provides support for their mediation program to prevent parental abductions, will also target situations where domestic violence has played a role. Also, OJJDP is exploring potential documents dealing with family violence issues and parental abduction for publication and dissemination.

**Comment:** One letter questioned the need to include law enforcement agencies in multi-disciplinary training on the reunification of missing children and suggests that training for mental health professionals will be covered in the "Treatment Approaches" project.

**OJJDP Response:** The "Reunification of Missing Children Project" found that in all of the cases of recovered children in the project sample, reunification meetings were extremely brief, with no set goals or plans. Mental health professionals had virtually no involvement in the reunification meetings. Most of these meetings occurred in police stations or transportation depots. In almost all cases, law enforcement personnel were the only non-family members present at the time of reunification and were expected to manage the meetings without special training or technical assistance support. The primary goal of reunification training and technical assistance is to target the first responders (usually law enforcement personnel) to encourage the development or accessing of multi-agency response teams for the purpose of approaching the recovery and reunification of a missing child with a coordinated plan. A second goal is to encourage and assist missing children clearinghouses and nonprofit organizations to develop information and reunification assistance programs. OJJDP has decided to develop and operate this program through its cooperative agreement with the National Center for Missing and Exploited Children (NCMEC). As the national clearinghouse and resource center on missing and exploited children, NCMEC is the logical place to establish a primary ongoing reunification assistance component. This project will involve: (1) The development and dissemination of a monograph for professionals involved in the recovery and reunification of



missing children with their families; (2) development of specialized training programs and technical assistance for law enforcement agencies, State clearinghouse personnel, social services agencies, and nonprofit organizations; and (3) development of a nationwide network of resources for reunification services and assistance.

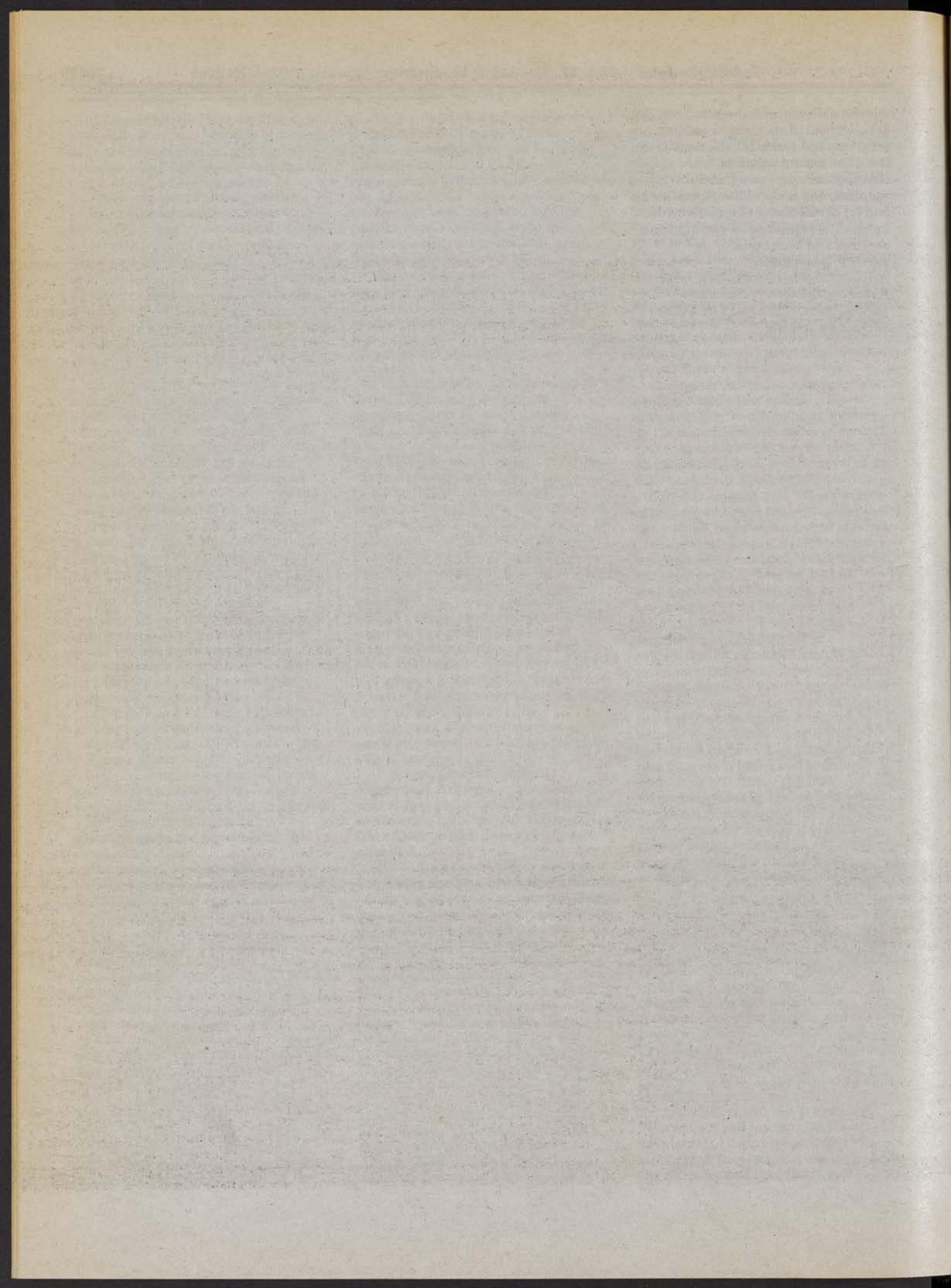
Gerald P. (Jerry) Regier,

*Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.*

[FR Doc. 92-14777 Filed 6-23-92; 8:45 am]

BILLING CODE 4410-18-M







# **federal register**

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**Wednesday  
June 24, 1992**

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## **Part VI**

### **Department of Education**

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**34 CFR Part 282**

**Territories and Freely Associated States  
Educational Grant Program; Proposed  
Rule**



## DEPARTMENT OF EDUCATION

## 34 CFR Part 282

[RIN 1810-AA62]

## Territories and Freely Associated States Educational Grant Program

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

**SUMMARY:** The Secretary proposes to amend chapter II of title 34 of the Code of Federal Regulations (CFR), containing regulations for the Office of Elementary and Secondary Education of the Department of Education (Department), to add a new part 282. The new part would include regulations for the Territories and Freely Associated States Educational Grant Program authorized by section 1005(a)(3) of chapter 1 of title I of the Elementary and Secondary Education Act of 1965, as added by section 802(a) of the National Literacy Act of 1991, Public Law 102-73. These proposed regulations would provide standards and requirements for the administration of that program.

**DATES:** Comments must be received on or before August 10, 1992.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to Alicia Coro, U.S. Department of Education, 400 Maryland Avenue, SW., room 2071, Washington, DC 20202-6246.

**FOR FURTHER INFORMATION CONTACT:** Zulla Toney, Telephone: (202) 401-1154. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 (in the Washington, DC 202 area code, telephone 708-9300) between 8 a.m. and 7 p.m., Eastern time.

**SUPPLEMENTARY INFORMATION:** Section 1005(a)(3) of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (the Act), as added by section 802(a) of the National Literacy Act of 1991, provides for a program of competitive grants to local educational agencies (LEAs) in named Territories and Freely Associated States. LEAs in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands are eligible for grants under the program. The grants may be used for educational purposes as described in section 1005(a)(3)(C) of the Act. Section 1005(a)(3)(B) of the Act establishes a formula for determining the amount of the chapter I appropriations to be reserved for the program.

A special requirement of this program is that the regional educational laboratory for the Pacific region conduct the competition and recommend to the Secretary the applications that should be funded. The contract to operate the educational laboratory for the Pacific region is currently held by the Pacific Region Educational Laboratory (PREL), located in Honolulu, Hawaii.

These regulations would establish the role of PREL with respect to the program in somewhat greater detail than the statute. The proposed regulations would provide that PREL receive applications for grants, conduct the competition using a peer review system, and make recommendations to the Secretary regarding the award of the grants. The Secretary would consider these recommendations in accordance with the evaluation criteria contained in the regulations. PREL would be authorized to provide technical assistance and to serve as fiscal agent for a grantee under the limitations contained in the proposed regulations.

These proposed regulations would describe the requirements and standards for the administration of the Territories and Freely Associated States Educational Grant Program. More particularly, the regulations provide guidance and requirements regarding the general provisions applicable to the program, the kinds of projects the Secretary assists under the program, how applicants apply for grants, and the procedures the Secretary uses in making grants, including the criteria and other factors that the Secretary uses in evaluating applications. In the development of these proposed regulations, the Department has consulted with PREL. \$3.8 million is reserved for the program in fiscal year 1992.

This program provides support to the Territories and Freely Associated States for activities that will enable students to make progress toward achieving the high levels of educational performance envisioned by the National Education Goals. Funds available under the program may be used by grantees to carry out many of the specific activities outlined in AMERICA 2000, the President's strategy for moving the Nation toward achievement of the goals by the year 2000.

The appendix to the proposed regulations answers, for the guidance of applicants, questions posed during the development of the proposed regulations that are not reflected in the text of the proposed part 282.

## Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major regulations because they do not meet the criteria for major regulations established in the order.

## Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant impact on a substantial number of small entities. These proposed regulations are intended to implement statutory provisions and are designed to provide maximum flexibility in the administration of the program in question.

## Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

## Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

## Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in room 2040, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays. To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.



**List of Subjects in 34 CFR Part 282**

Education, Elementary and secondary education. Grant programs—education.

Dated: June 18, 1992.

Lamar Alexander,  
Secretary of Education.

(Catalog of Federal Domestic Assistance Number has not been assigned)

The Secretary proposes to amend title 34 of the Code of Federal Regulations by adding a new Part 282 to read as follows:

**PART 282—TERRITORIES AND FREELY ASSOCIATED STATES EDUCATIONAL GRANT PROGRAM**

**Subpart A—General**

Sec.

282.1 What is the Territories and Freely Associated States Educational Grant Program?

282.2 Who is eligible to receive a grant?

282.3 What regulations apply to the program?

282.4 What definitions apply to the program?

**Subpart B—What Kinds of Projects Does the Secretary Assist Under this Program?**

282.11 What activities are eligible for assistance?

282.12 What school improvement and reform activities may the grantee conduct under § 282.11(e)?

282.13 What limitations apply to the use of funds under this program?

282.14 What priorities may the Secretary establish?

**Subpart C—How Does One Apply for A Grant?**

282.21 How does a local educational agency apply for a grant under this program?

**Subpart D—How Does the Secretary Make A Grant?**

282.31 How is a competition for an award conducted for this program?

282.32 How does PREL conduct a competition?

282.33 How does the Secretary select applications for funding?

282.34 How does the Secretary evaluate an application?

282.35 What selection criteria does the Secretary use?

282.36 To what extent is equitable geographic distribution considered?

**Subpart E—What Conditions Must be Met for A Grantee?**

282.40 Do applicable laws and regulations govern LEAs that receive grants?

282.41 May a grantee use a fiscal agent?

282.42 Under what circumstances does the Secretary make continuation awards?

282.43 What reports may the Secretary require?

Authority: 20 U.S.C. 2711(a)(3).

**Subpart A—General**

**§ 282.1 What is the Territories and Freely Associated States Educational Grant Program?**

The Territories and Freely Associated States Educational Grant Program is designed to provide financial assistance in the form of competitive grants to local educational agencies (LEAs) in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands. The grants may be used for educational purposes as described in § 282.11.

(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.2 Who is eligible to receive a grant?**

A local educational agency (LEA) in any one of the following jurisdictions is eligible to receive a grant.

- (a) Guam.
- (b) American Samoa.
- (c) The Commonwealth of the Northern Mariana Islands.
- (d) Palau.
- (e) The Federated States of Micronesia.
- (f) The Republic of the Marshall Islands.

(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.3 What regulations apply to the program?**

The following regulations apply to the Territories and Freely Associated States Educational Grant Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 75 (Direct Grant Programs), except that 34 CFR 75.720(b) regarding the frequency of certain reports does not apply.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(5) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(6) 34 CFR part 82 (New Restrictions on Lobbying).

(7) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(7) 34 CFR part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this part 282.

(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.4 What definitions apply to the program?**

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR part 77:

Applicant  
Application  
Department  
EDGAR  
Grants  
Grantee  
Project  
Project period  
Secretary

(Authority: 20 U.S.C. 2711(a)(3))

(b) *Other definitions.* The following definitions also apply to this part:

*Freely Associated State* means:

- (1) The Federated States of Micronesia,
- (2) The Republic of the Marshall Islands, and
- (3) Palau if its Compact of Free Association is approved in accordance with law.

*Local educational agency (LEA)* means a public board of education or other public authority legally constituted within a Territory or Freely Associated State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city school district or other political subdivision of a Territory or Freely Associated State, or a combination of school districts as are recognized in a Territory or Freely Associated State as an administrative agency for its public elementary or secondary schools. The term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

*National Education Goals* means the following goals to be achieved by the year 2000:

(1) All children will start school ready to learn.

(2) The high school graduation rate will increase to at least 90 percent.

(3) Students will leave grades four, eight, and twelve having demonstrated competency in challenging subject matter, including English, mathematics, science, history, and geography, and every school will ensure that all students learn to use their minds well, so that they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy.

(4) Students will be first in the world in science and mathematics achievement.

(5) Every adult will be literate and will possess the knowledge and skills



necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

(6) Every school will be free of drugs and violence and will offer a disciplined environment conducive to learning.

*PREL* means the Pacific Region Educational Laboratory in Honolulu, Hawaii, or its successor.

*Territory* means (1) Guam, (2) American Samoa, (3) the Commonwealth of the Northern Mariana Islands, and (4) Palau until its Compact of Free Association is approved in accordance with law.

(Authority: 20 U.S.C. 2711(a)(3))

#### **Subpart B—What Kinds of Projects Does the Secretary Assist Under This Program?**

##### **§ 282.11 What activities are eligible for assistance?**

Under this program, the Secretary awards grants for projects to—

(a) Conduct activities consistent with the purposes of—

(1) Title I of the Elementary and Secondary Education Act of 1965, including chapter 1, which includes the Even Start program, and Chapter 2 of that title;

(2) The Adult Education Act;

(3) The Individuals with Disabilities Education Act;

(4) The Library Services and Construction Act; or

(5) The Dwight D. Eisenhower Mathematics and Science Education Act;

(b) Develop and provide preservice and inservice training for elementary and secondary school teachers;

(c) Develop curricula;

(d) Develop and acquire instructional materials; or

(e) Develop and conduct general school improvement and reform activities.

(Authority: 20 U.S.C. 2711(a)(3))

##### **§ 282.12 What school improvement and reform activities may a grantee conduct under § 282.11(e)?**

The following illustrates the types of school improvement and reform activities that a grantee may conduct with funds under this program:

(a) The establishment of skill centers to provide job skills diagnosis and referral services.

(b) The planning, design, and operation of model, innovative schools that—

(1) Employ the most effective methods of teaching and learning;

(2) Use the latest educational technologies; and

(3) Are specially tailored to meet the educational needs of the children in the area to be served.

(c) The establishment of academies to provide intensive training for school leaders and principals in instructional leadership, school-based management, effective school reform strategies, and implementation of school-level accountability mechanisms.

(d) The establishment of academies for teachers to ensure they possess the knowledge and skills to help students meet high standards for academic achievement in the five core academic disciplines listed in the National Education Goals.

(e) Preschool programs that will enable disadvantaged and disabled children to have access to high quality programs that help prepare them for school.

(f) Programs designed to strengthen the knowledge and skills of elementary and secondary students in English, mathematics, science, history, and geography.

(g) Programs that involve families, communities and businesses in the planning and operation of educational programs for children.

(h) Programs to enhance parental educational choice.

(i) Other programs to advance the National Education Goals or other comprehensive educational goals or priorities established by the relevant Territory, Freely Associated State or LEA.

(Authority: 20 U.S.C. 2711(a)(3))

##### **§ 282.13 What limitations apply to the use of funds under this program?**

(a) A grantee may use funds available under this part only to provide direct educational services.

(b) For the purposes of this part, direct educational services—

(1) Means activities that are designed to improve student achievement or the quality of education;

(2) Includes instructional services for students and teacher training;

(3) Does not include construction, remodeling, or repair.

(Authority: 20 U.S.C. 2711(a)(3))

##### **§ 282.14 What priorities may the Secretary establish?**

(a) The Secretary may establish as a priority, in any fiscal year, one or more of the activities contained in §§ 282.11 and 282.12.

(b) The Secretary announces these priorities in a notice published in the *Federal Register*.

(Authority: 20 U.S.C. 2711(a)(3))

#### **Subpart C—How Does One Apply for a Grant?**

##### **§ 282.21 How does a local educational agency apply for a grant under this program?**

In order to compete for a grant under this part, a LEA shall submit an application to PREL for consideration. The applicant shall submit the application in accordance with deadlines and other administrative procedures established by PREL.

(Authority: 20 U.S.C. 2711(a)(3))

#### **Subpart D—How Does the Secretary Make a Grant?**

##### **§ 282.31 How is a competition for an award conducted for this program?**

PREL conducts competitions for awards for the program on behalf of the Secretary.

(Authority: 20 U.S.C. 2711(a)(3))

##### **§ 282.32 How does PREL conduct a competition?**

To conduct a competition under the program, PREL shall—

(a) Provide a plan to the Secretary describing how the review will be conducted;

(b) Use a peer review system to review and rate applications for awards;

(c) Review the applications in accordance with the regulations in this part;

(d) Inform the Secretary of the results of the review; and

(e) Make recommendations to the Secretary regarding the award of grants.

(Authority: 20 U.S.C. 2711(a)(3))

##### **§ 282.33 How does the Secretary select applications for funding?**

In determining the order of selection for awards under the program, the Secretary considers—

(a) The selection criteria in § 282.35.

(b) The recommendations of PREL.

(Authority: 20 U.S.C. 2711(a)(3))

##### **§ 282.34 How does the Secretary evaluate an application?**

(a) The Secretary evaluates an application for a grant under this part on the basis of the criteria listed in § 282.35. The Secretary awards a maximum of 100 points for all the criteria. The maximum possible score for each criterion is indicated in parentheses after the criterion heading.

(b) In making recommendations to the Secretary with respect to the award of a grant and the amount to be awarded, PREL shall use the criteria and additional factors included in this subpart.



(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.35 What selection criteria does the Secretary use?**

The Secretary use the following selection criteria in evaluating each application:

(a) *Educational need.* (25 points) The Secretary reviews each application to determine the extent of the educational need in the area to be served and the extent to which the proposed project is likely to address that need effectively, including—

(1) The manner in which the applicant has identified the educational need to be addressed by the project;

(2) The relative gravity of the educational need in the applicant LEA as compared with educational need in LEAs in other Territories and Freely Associated States;

(3) The likely effectiveness of the proposed project in addressing the need on a basis that will provide sustained educational benefits throughout the area to be served over an extended period of time; and

(4) The extent to which the proposed project addresses educational goals or priorities as established by the relevant LEA, Territory or Freely Associated State.

(b) *Relationship to the National Education Goals.* (15 points). The Secretary reviews each application to determine the effectiveness with which the proposed project will further the achievement in the area to be served of one or more of the National Education Goals and of other comprehensive educational goals or priorities established by the relevant LEA, Territory or Freely Associated State to be served.

(c) *Plan of Operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The adequacy of the description of the services to be provided;

(2) The feasibility of the scope of the project;

(3) The quality of the design of the project;

(4) The extent to which the project includes specific intended outcomes that—

(i) Will accomplish the purposes of the program;

(ii) Are attainable within the budget period, given the project's budget and other resources;

(iii) Are objective and measurable; and

(iv) For a multi-year project, include specific objectives to be met, during each budget period, that can be used to

determine the progress of the project toward meeting its intended outcomes;

(5) The extent to which the plan is effective and ensures proper and efficient administration of the project;

(6) The quality of the applicant's plan to use its resources and personnel to achieve each objective and intended outcome during the period of Federal funding;

(7) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disabling condition; and

(8) The extent to which the applicant will coordinate activities with other local or federally funded programs or projects.

(d) *Budget and cost effectiveness.* (5 points). The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(e) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use on the project, including—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (e)(1) (i) and (ii) of this section will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disabling condition.

(2) To determine personnel qualifications under paragraph (d)(1) of this section, the Secretary considers—

(i) Experience and training, in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the quality of the project.

(3) In applying this criterion, the Secretary takes into account special circumstances that may affect the ability of an applicant to recruit experienced or highly credentialed personnel.

(f) *Evaluation plan.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate to the project;

(2) Will determine how successful the project is in meeting its intended outcomes;

(3) To the extent possible, will produce objective and quantifiable data; and

(4) Take into account responses to the project from parents, teachers and other community members in the area to be served.

Cross-reference: See 34 CFR 75.590 Evaluation by the grantee.

(g) *Commitment and capacity.* (5 points) The Secretary reviews each application to determine the applicant's commitment to the effective operation of the project, and the likelihood of the applicant's continued efforts to carry out the project when Federal assistance under this part ends.

(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.36 To what extent is equitable geographic distribution considered?**

In determining whether to make an award and in determining the amount of the award, the Secretary considers the extent to which approval of the application will contribute to a fair and equitable geographic distribution of funds and services under the program among the LEAs in the Territories and Freely Associated States.

(Authority: 20 U.S.C. 2711(a)(3))

**Subpart E—What Conditions Must be Met by a Grantee?**

**§ 282.40 Do applicable laws and regulations govern LEAs that receive grants?**

An LEA in a Territory or a Freely Associated State that receives a grant under the program is subject to all laws, regulations, and requirements applicable to the program.

(Authority: 20 U.S.C. 2711(a)(3); Pub. L. 99-239, section 105(a))

**§ 282.41 May a grantee use a fiscal agent?**

(a) A grantee may contract to use a fiscal agent in the financial administration of the grant.

(b) The grantee may use grant funds to reimburse a fiscal agent only for direct costs in carrying out the duties of a fiscal agent.

(c) The grantee may use PREL as a fiscal agent under this section with the written approval of the Secretary.

(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.42 Under what circumstances does the Secretary make continuation awards?**

(a) The Secretary may make a continuation award for a budget period after the first budget period of an



approved multi-year project under the program, if—

(1) The conditions in 34 CFR 75.253(a) are met; and

(2) Any evaluation of the project that has been conducted indicates that the continuation of the project will lead to sustained educational improvement in the area to be served.

(b) In determining whether to make a continuation award, the Secretary requests and takes into account the recommendations of PREL.

(Authority: 20 U.S.C. 2711(a)(3))

**§ 282.43 What reports may the Secretary require?**

The Secretary may require a grantee to submit reports containing information the Secretary finds necessary to carry out the Secretary's functions under the program.

(Authority: 20 U.S.C. 2711(a)(3))

Note: This appendix will not be codified in the Code of Federal Regulations.

**Appendix**

The following paragraphs respond to questions raised during the development of the regulations for this program that are not specifically addressed in part 282.

1. May two or more local agencies apply as a group or consortium?

Two or more local educational agencies may apply as a group for a

grant under the program. Group applications must comply with the regulations in §§ 75.127–75.129 of EDGAR. Under these regulations if a group of LEAs applies for a grant, the members of the group must either designate one member of the group to apply for the grant or establish a separate LEA to apply for the grant. The members of the group must enter into an agreement meeting the requirements of § 75.128(b) of EDGAR. The applicant for the group is the grantee and is legally responsible for the use of all grant funds and ensuring that the project is carried out by the group in accordance with Federal requirements. Each member of the group is legally responsible to carry out the activities it agrees to perform and use the funds that it receives under the group agreement in accordance with Federal requirements that apply to the grant.

2. What are the contents of an application that an LEA must submit?

The Secretary will prepare an application package describing the contents of the application. Sections 75.111–75.117 of EDGAR describe the information required to be included in the application. In general, an applicant must be prepared to describe the project, the key personnel, the resources, and the evaluation plan, and must assure compliance with appropriate requirements of law. The applicant must

also include a proposed project period and a timeline, and must demonstrate the applicant's capability to conduct the project.

In addition, the Secretary anticipates that an applicant will be required to describe how the applicant's project will make progress towards achieving one or more of the National Education Goals and other priorities of the applicant.

3. What financial reports will a grantee be required to submit?

Section 80.41 of EDGAR describes a grantee's financial reporting requirements. A grantee shall submit quarterly financial status reports.

4. What is the length of the project and budget periods?

The Secretary approves a project period of up to 36 months and a budget period of not more than 12 months for a grant under the program. Section 75.118 of EDGAR contains regulations regarding applications for continuation awards.

5. What is the role of PREL in the consideration of applications for continuation awards?

The Secretary consults with PREL with respect to the making of these awards.

(Authority: 20 U.S.C. 2711(a)(3))

[FR Doc. 92-14796 Filed 6-23-92; 8:45am]

BILLING CODE 4000-01-M



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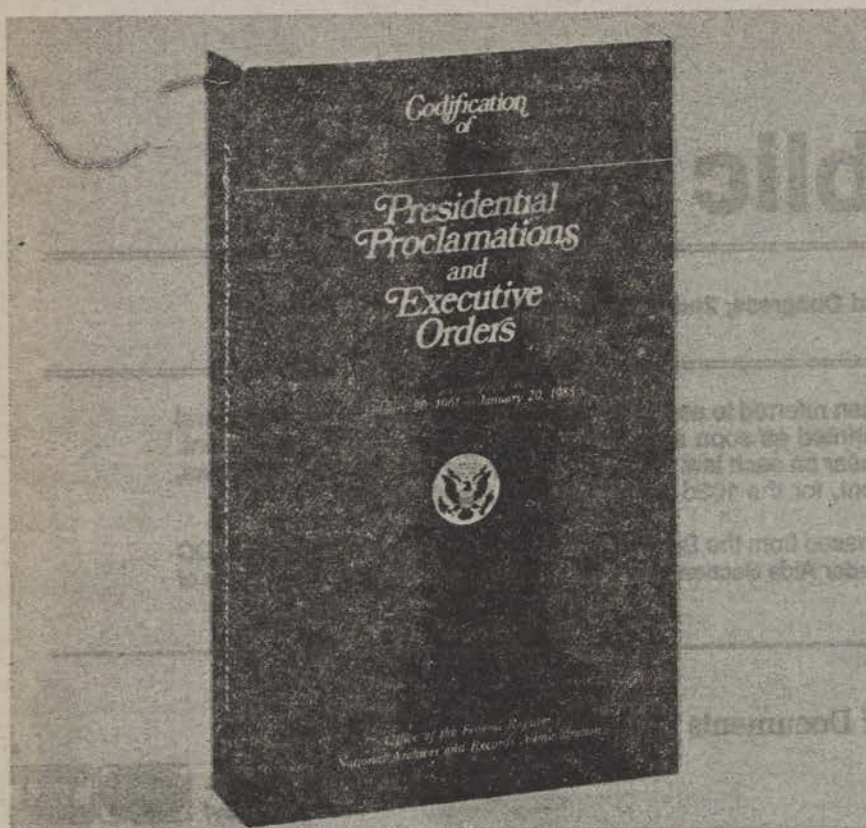
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# Experiments

## Experiment 1 (CPR)

The first experiment was designed to test the hypothesis that the use of a CPR mask would increase the effectiveness of mouth-to-mouth resuscitation. The subjects were divided into two groups: one group used a CPR mask, and the other group used mouth-to-mouth resuscitation without a mask. The results showed that the group using the CPR mask had a significantly higher survival rate than the group without a mask.

The second experiment was designed to test the hypothesis that the use of a CPR mask would increase the effectiveness of mouth-to-mouth resuscitation. The subjects were divided into two groups: one group used a CPR mask, and the other group used mouth-to-mouth resuscitation without a mask. The results showed that the group using the CPR mask had a significantly higher survival rate than the group without a mask.

The third experiment was designed to test the hypothesis that the use of a CPR mask would increase the effectiveness of mouth-to-mouth resuscitation. The subjects were divided into two groups: one group used a CPR mask, and the other group used mouth-to-mouth resuscitation without a mask. The results showed that the group using the CPR mask had a significantly higher survival rate than the group without a mask.

The fourth experiment was designed to test the hypothesis that the use of a CPR mask would increase the effectiveness of mouth-to-mouth resuscitation. The subjects were divided into two groups: one group used a CPR mask, and the other group used mouth-to-mouth resuscitation without a mask. The results showed that the group using the CPR mask had a significantly higher survival rate than the group without a mask.

The fifth experiment was designed to test the hypothesis that the use of a CPR mask would increase the effectiveness of mouth-to-mouth resuscitation. The subjects were divided into two groups: one group used a CPR mask, and the other group used mouth-to-mouth resuscitation without a mask. The results showed that the group using the CPR mask had a significantly higher survival rate than the group without a mask.



